ROYAL COURT
(Samedi Division) 46.

Judgment reserved: 28th February, 1996.
Reserved Judgment delivered: 6th March, 1996.

Before: The Deputy Bailiff, and
Jurats Bonn and Vibert

Between	Mayo Associates S.A. Troy Associates Limited TTS International SA Michael Gordon Marsh Myles Tweedale Stott	Representors
And	The Finance and Economics Committee	Respondent

Appeal against Order of Judicial Greffier of 7th December, 1995, for Discovery.

Advocate P. C Sinel for the Representors.
H.M. Solicitor General for the Respondent.

JUDGMENT

THE DEPUTY BAILIFF: This is an application made on behalf of the Finance and Economics Committee ("the Committee") to have an order of the Judicial Greffier of 7th December 1995 set aside in its entirety.

On 8th December, 1994, an application for Judicial Review was brought by five representors. Of those five representors, Mayo is a Swiss corporation engaged in business (for these purposes) as an investment administrator, TTSI is a subsidiary of Mayo, Troy is a Liberian corporation engaged in business as an investment manager, Mr. Marsh is an investor and Mr. Stott is the sole principal and

beneficial owner of Mayo. He is, according to Mr. Sinel, also an investor.

The representation is very detailed and contains the most serious allegations of misfeasance against Cantrade Private Bank Switzerland (C.I.) Limited ("Cantrade") and Dr. R.J.Young who controlled and owned a company called Anagram Econometrics Limited ("AEC") with his wife Maureen Lambert Young ("Mrs. Young"). Later this company was superseded by another company, Anagram (Bermuda) Ltd. ("Anagram") still owned and controlled by Dr. & Mrs. Young,.

Apparently, because of the alleged misfeasance of Cantrade and Anagram, some 90 investors (including Mr. Marsh and Mr. Stott) have lost some $25,000,000. The Committee have not investigated the matter to the satisfaction of the representors. Advocate Sinel did not mince his words. This was, as he put it, fraud, institutionalised racketeering and *"the most disgraceful, shameful and worst decision of a committee in the island's history"*. There was more emotive language. Let us see if we can examine the matter a little more dispassionately.

There are two complex actions; both started in 1994. They are complaints that Cantrade and others have acted deliberately and criminally to deprive investors by taking unwarranted commissions in investment programmes in the currency markets.

A representation was brought before this Court on 9th December, 1994. At that time, the Court adjourned for the consideration of the matter until 23rd December, 1994, in order that a copy be served on the respondent.

On the representation which was amended by the time it came for hearing before the Judicial Greffier, the Solicitor General points out that it is not pleaded that loss was caused to the representors by breach of duty of the Committee. It is not pleaded that the representors have an interest in the investigation above that of a member of the public. It is not pleaded that the remedy would affect the representors personally or that it would affect them more than any other members of the public. The prayer of the Representation seeks four remedies.

(1) That the Committee's decision not to investigate the complaint of activities of Cantrade be quashed.

(2) That the Committee be condemned to admit the complaints of the representors and to investigate the complaint of activities by Cantrade.

(3) That the Committee be condemned to suspend the activities of Cantrade pending the completion of such investigation, and

(4) That the defendants be condemned to exercise their powers pursuant to article 10 of the "Banking Law" in such a manner as to prevent Cantrade or the aforementioned subsidiary of Union Bank of Switzerland from behaving in the future in the manner complained of by the representors.

We question whether the draftsman of those four prayers considered the implication of the Court's compelling the Committee to perform acts which lie within its discretionary powers.

The prayer of the amended representation says that the Committee have failed:-

(1) to fulfil the function for which they exist

(2) behaved in an irrational, perverse and illogical manner, and

(3) behaved unlawfully

That is perhaps to go outside the test of Wednesbury unreasonableness (Associated Provincial Picture Houses, Ltd. -v- Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680; [1947] 1 LT 641; 63 TLR 623; 117 LJR 190; 45 LGR 635; 112 JP 5; 92 Sol.Jo. 26) which is, we suppose, wrongfulness in detail. The details in Wednesbury are, for example, errors of law, procedural defaults or *ultra vires* acts. The Committee cannot, in exercising its discretion, go outside the decision making discretion conferred upon it by the Statute (or Statutes) appointing it. Once a Committee goes outside its jurisdiction - and can be shown to have gone outside its jurisdiction - then the Court will be able to examine and if necessary correct the decision. It seems to us that the way that a Committee reaches its decision is also important. We shall consider that aspect in due course.

We can see that principle set out in The Jersey Civil Service Association and The 2/300 Branch in Jersey of the Association of Clerical, Technical and Supervisory Staff (24th November, 1994) Jersey Unreported, where the Court said this:

> ***"The House of Lords in the CCSU case also reiterated the three heads which govern judicial review of administrative action, they are:***
>
> ***1. Illegality where the decision making authority has been guilty of an error of law, e.g. by purporting to exercise a power it does not possess.***
>
> ***2. Irrationality where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision.***

3. Procedural impropriety where the decision making authority has failed in its duty to act fairly.

These principles were considered by the Royal Court in its judgment in the J.N.W.W. -v- Rate Assessment Committees (16th June, 1994) Jersey Unreported. They correspond to those enumerated in Safe-guard Business Systems (C.I.) Limited trading as B.H.Rowland v. The Finance and Economics Committee (1981) JJ at pages 172 to 173 although expressed in slightly different terms. There the corresponding principle is that laid down by the Court in Le Masurier v. The Natural Beauties Committee (1958) 13 CR 139. It is "were the proceedings of the Committee in relation to the application a rejection of which gives rise to the present appeal in general sufficient and satisfactory"."

On 13th October, 1995 (and we have an explanation from the Solicitor General for the delay) on the application of the Representors, the learned Greffier set the representation down for hearing, but he did not *"then make the usual order for mutual general discovery as he had received notice from the Solicitor General of her opposition to such an order being made"*. That passage concerns us. The application was one for judicial review. Did the learned Greffier have the right (which he apparently would have exercised had he not received the Solicitor General's letter) to order general discovery in the case of a judicial review?

In Daisy Hill Real Estates Limited v. The Rent Control Tribunal (8th June, 1995) Jersey Unreported we said this:

"We turn now to the judgment of the learned Greffier and our duties in considering it. These are clear. In Hambros Bank (Jersey) Limited v. David Eves and Helga Maria Eves (née Buchel) (30th September 1994) Jersey Unreported C of A, the Court of Appeal at page 4 of its judgment supported an earlier judgment of this Court in this way:

> *"In Heseltine v. Strachan & Co. (1989) JLR 1, the Royal Court held that an appeal to the Royal Court under the Royal Court Rules (1982), against the decision of the Judicial Greffier in respect of security for costs, should be conducted by way of re-hearing. At p. 6, the Commissioner said this:*
>
> *"There are differences between the Jersey practice and the English practice. Certainly the court in Jersey has a wider discretion to order security than the master has in England. It does seem to us that the Deputy Judicial Greffier was given the right to order security by the Rules. From that order an*

> *appeal lies to the Royal Court. The making of the order is discretionary. The discretion in our view is vested in the Royal Court and we can see no reason why the Royal Court cannot exercise its discretion in a way contrary to the manner that the Deputy Judicial Greffier exercised it. Weight will obviously be given to the decision of the Greffier; he will often have a long experience in dealing with interlocutory matters of this kind. We can see no reason why the court's hands should be fettered in the way suggested by Advocate Mourant, and we will therefore proceed to deal with the matter as though it had come before us for the first time (emphasis added)"*

> *We intend to follow the course adopted by us earlier and particularly in the weight that we attach to the Judicial Greffier's decision."*

The remarks that we made there, of course, are relevant particularly where the learned Greffier is passing over ground which has been well ploughed in the past. In this case, we are approaching a matter which is entirely novel for this island. The learned Greffier put it this way:-

> *"At the present time, the procedure in the Royal Court in relation to cases in which judicial review is sought is somewhat primitive."*

In passing, the Solicitor General counsels caution in the possible context of a fishing expedition. She pointed out that in Mayo v. Anagram (Bermuda) Ltd. & Ors. (23rd June, 1995) Jersey Unreported CofA, the Court of Appeal said this where the same plaintiffs (but not Mr. Marsh) were heard on appeal:-

> *"Our conclusion is that material obtained by the appellants under the Anton Piller Order was used by them for a purpose collateral to the litigation contrary to the implied undertaking given by the appellants to the Court."*

In the absence of a structured system in Jersey the learned Judicial Greffier has followed English procedures. He cites Order 53 Rule 3 and in particular Order 53 Rule 3(7) (which is, of course, not a part of our Rules of Court) and which states *"(7) the Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application refers"*. Our Rules of Court are clearly not geared to this unique problem, although, as we have said, the Greffier did consider making what he called *"the usual Order for general discovery"*. The usual Order is provided by Rule 6/16 as follows:-

> *"6/16.-(1) The Court may order any party to any proceedings to furnish any other party with a list of the*

documents which are or have been in his possession, custody or power relating to any matter in question n the cause or matter, and to verify such list by affidavit.

(2) An order under paragraph (1) of this Rule may be limited to such documents or classes of documents only, or to such only of the matters in question in the proceedings, as may be specified in the order."

The Rules of the Supreme Court are not parallel because there is a power within the Rules specifically to limit or not order if not necessary. Order 24 Rule 2 reads:-

"(1) subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.

Without prejudice to any directions given by the Court under Order 16, rule 4, this paragraph shall not apply in third party proceedings, including proceedings under that Order involving fourth or subsequent parties.

(5) On the application of any party required by this rule to make discovery of documents, the Court may -

(a) order that the parties to the action or any of them shall make discovery under paragraph (1) of such documents or classes of documents only, or as to such only of the matters in question, as may be specified in the order, or

(b) if satisfied that discovery by all or any of the parties is not necessary, or not necessary at that stage of the action, order that there shall be no discovery of documents by any or all of the parties either at all or at that stage;

and the Court shall make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the action or for saving costs."

Order 24 Rule 8 provides that discovery will be ordered only if necessary. Order 24 Rule 13 again says that production is only to be ordered if necessary. We have to recall, however, that the Rules of the Supreme Court are often followed within this jurisdiction. So in Victor Hanby Associates Limited and Hanby v.

Oliver (1990) JLR 337 the Court of Appeal was content to follow the provisions of the Rules of the Supreme Court. There the Court was dealing with Order 24 Rule 7 and said this:

> *"We have thought it right to examine the position in England as it has developed since the introduction of the Rules of the Supreme Court in 1875 for the reason that both the Judicial Greffier and the Royal Court, while recognising that the Royal Court Rules, 1982 contain no provisions comparable to O.24 r.7 of the current Rules of the Supreme Court, nevertheless regarded it as appropriate to apply principles which, in English practice, are founded on that rule alone. There can be no doubt that, but for the existence of O.24, r.7 - or its predecessor, O.XXXI, r.19A(3) - an English court, bound by the practice adopted since Jones v. Monte Video Gas Co. (4) was decided in 1880, would have refused to entertain the applications for specific discovery in the present case.*
>
> *The courts in this Island are not bound by a practice that was adopted in England during the last century, which was founded on the former practice of the English Court of Chancery, and which was found to be unduly restrictive. Unless there is something in the language of r.6/16 of the Royal Court Rules, 1982 which compels a contrary conclusion, it is open to the Royal Court to develop its own practice as to the circumstances in which it allows a party to challenge the opposing party's affidavit of documents. It is clear that the court must permit itself to be concerned with the question whether there has been compliance with an order which it has made under r.6/16(1). We do not find anything in the language of r.6/16 which requires a court properly concerned with that question to refuse to take account of relevant evidence from whatever source. Although there are passages in the judgment of Brett, L.J. in Jones v. Monte Video Gas Co. which suggest that he was regarding the question as one of construction of O.XXXI, r.12(1) of the 1875 Rules of the Supreme Court, we do not think that that was the true basis on which he reached his decision. A careful examination of all three judgments in that case shows that the question was regarded, essentially, as one of practice. As events have turned out, the practice has been altered by the introduction of a new rule - O.24, r.7 - and the practical dangers foreseen by the Court of Appeal in 1880 have been found to be capable of containment."*

The Court went on to say -

> *"We should add that, even where a prima facie case of possession and relevance is made out, an order for specific discovery should not follow as a matter of*

course. The court will still need to ask itself the question whether an order for specific discovery is necessary for disposing fairly of the cause or matter It must be kept in mind that O.24, r.7 of the English Rules of the Supreme Court is itself subject to r.8 of the same order, which makes this further requirement explicit."

It is clear under the particular provisions of the Rules of the Supreme Court and in relation to judicial review that we are facing a matter which is under English law very technical. It is set out in the introduction to Chapter 9 of Judicial Remedies in Public Law by Clive Lewis, and headed "Machinery of Judicial Review". We regret having to set it out at such length but it is important to grasp immediately that, in the field of Judicial Review, this jurisdiction has a long way to go before it can emulate the English system. We say this because we do not feel that we can adapt the Rules of the Supreme Court to fill every void simply because we have no procedure here to deal with the matters in question. The extract reads:-

"An application for judicial review is conducted in two stages. The applicant must first apply for leave to apply for judicial review. If leave is granted, a full hearing of the substantive application will take place at a later stage. It is at that later stage that the court will determine whether the applicant has established a ground of judicial review, and whether the court should exercise its discretion and grant the applicant one or more of the remedies available on a judicial review application."

Need to specify relief sought

The application must specify the particular relief sought. The notice should identify the decision or other measure that is being challenged, or what conduct or omission to act is complained of. The relief sought should obviously be related to the measure that is challenged, and should reflect the aim that the judicial review application is designed to fulfil.

Need to specify grounds on which relief sought

The notice must also set out the grounds for relief. In order to obtain judicial review, the applicant must establish one or more of the substantive heads of judicial review, such as abuse of discretion, error of law, or breach of procedural requirements. The applicant should state the essential issues of fact or law which demonstrate that one of the heads of review is applicable, and that the public body has acted unlawfully in some way.

Affidavit in support of application

The applicant must also provide an affidavit verifying the facts relied upon. The applicant is under a duty to disclose all material facts.

Consideration of the initial application for leave

In both civil and criminal matters, the initial application will be dealt with by a single judge on the basis of the notice and affidavit in support, without an oral hearing unless the applicant requests an oral hearing in his notice of application. This will not normally be necessary since the applicant will have the opportunity to renew the application if leave is not granted. In addition, the applicant will also have the advantage of any observations made by the judge on the paper application. An oral hearing could be necessary if interim relief is sought, or where the facts or law are sufficiently unusual as to require some oral explanation, or where a specific direction is sought in relation to the substantive hearing such as a direction that the hearing be expedited.

A judge will normally be able to deal with the application for leave on an ex parte basis. He will grant leave if the test considered below is satisfied, or will refuse leave if it is clear on the papers that the applicant does not have an arguable case.

Test for granting leave

The requirement of leave is designed to filter out applications which are groundless or hopeless at an early stage. The purpose is: "... to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error and to remove the uncertainty in which public ... authorities might be left ...". As such, the aim is to prevent a wasteful use of judicial time and to protect public bodies from the embarrassment (intentional or otherwise) that might arise from the need to delay implementing decisions, where the legality of such decisions has been challenged. The leave requirement also enables an individual to obtain a quick and relatively cheap judicial consideration of whether his case has any prospect of success.

Standing. In addition to establishing an arguable case on the merits, other questions need to be addressed. The applicant is required to show sufficient interest in the matter to which the application relates. The House of Lords has held that there is a two-tier test of standing. At the leave stage, standing is to be regarded as a

threshold issue, designed to exclude frivolous or vexatious applications. A full consideration of whether the applicant does have sufficient interest will be undertaken at the full hearing of the application. Standing is considered in more detail in the next chapter.

Application for Judicial Review

Once leave to apply has been granted, the second stage of the judicial review process is the actual application for judicial review itself.

Respondent's affidavits

The affidavit should set out any facts on which the respondent intends to rely, and should identify issues that the respondent wishes to argue. The affidavit should also address the issues raised by the applicant. The Court of Appeal has indicated that judicial review is unlike civil litigation, and once leave has been granted the respondent should provide sufficient information to enable the court to determine whether the actions complained of were lawful. Sir John Donaldson M.R. expressed the view that the respondent was under "...a duty to make full and fair disclosure" once leave was granted. Purchas L.J. expressed his views more circumspectly, stating that the respondent "..... should set out fully what they did and why so far as is necessary fully and fairly to meet the challenge" made by the applicant. Failure to explain their actions may lead to the court ordering discovery or cross-examination, or the courts may in the absence of adequate explanation infer that no valid reason for the respondent's action exists (although the courts are in practice reluctant to make such inferences.) Further, if there is a creditable explanation for the failure of the respondent to put forward evidence, the courts are unlikely to draw adverse inferences from the respondent's silence."

It is quite clear that only after the procedure which we have set out in some detail has been followed and the judge is satisfied particularly as to status that the application can proceed. There is therefore a careful screening process in England where a judge considers certain specified matters and certain specified things and then, when he grants leave, the obligation to provide discovery may arise.

It is clear from the authorities that we have considered under RSC Order 53 that the proceedings in England are very much more circumscribed than with proceedings in general and it may be that the burden is on the applicant to show that discovery is

necessary although the burden may well be on the respondent to show that discovery is not necessary.

The matter is well summarised in Supperstone & Goudie's Judicial Review (1992) at page 368:-

> *"It thus appears that Lord Diplock's words in O'Reilly v Mackman at p 282C state the accepted position. However, the fact remains that the availability of discovery is much more limited than in writ actions because of the nature of the jurisdiction. It is clear that it will not be made available in aid of a simple fishing expedition (see Lord Wilberforce in the National Federation case at p 635) or to supplement a challenge based on Wednesbury unreasonableness in the hope of finding some as yet unsuspected defect in the reasoning. In R v Secretary of State for the Environment, ex p Doncaster Borough Council, [1990] COD 441 the court refused an application for discovery of internal working documents in relation to a decision to charge cap. Leggatt LJ accepted a submission that 'in order to test whether the Secretary of State's decisions were perverse under Wednesbury principles, the Court need do no more than look at the decisions themselves. If, on examination, they were found to be good, discovery of the Secretary of State's internal working documents did not make them bad, and, if bad, discovery was ex hypothesi unnecessary'. See also R v Secretary of State for the Environment, ex p Islington London Borough Council, (1991) Independent, 6 September, CA and R. v IRC, ex p Taylor [1989] 1 All ER 906 at p917. In the Islington case it was held that an applicant was not entitled to discovery to go behind an affidavit from the respondent unless there was some basis for saying that the affidavit was inaccurate or incomplete.*
>
> *Discovery may be ordered if there is some reason for thinking that affidavits do not disclose the full picture (see Re H (1990) Guardian, 17 May). It may be pertinent in this connection to bear in mind Parker LJ's exhortation in R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 941 that local authorities when challenged, 'should set out fully what they did and why, so far as is necessary fully and fairly to meet the challenge' (see p 947e,). He made it clear that the power to order discovery or interrogatories could be used to make good any deficiencies (see p 947d).*
>
> *The possibility of a claim of public interest immunity needs to be borne in mind in discovery applications in the context of judicial review, as in other areas of law (see, e.g. Conway v Rimmer [1968] AC 910; Air Canada v Secretary of State for Trade (No 2) [1983] 2 AC 394; Rogers v*

Secretary of State for the Home Department [1973] AC 388, [1972] 2 All ER 1057; D v national Society for the Prevention of Cruelty to Children [1978] AC 171."

Affidavits in applications such as this have never been a part of our procedure and as we have said the field into which we are now entering is an entirely new one for this jurisdiction. Clive Lewis in his work "Judicial Remedies in Public Law" says at page 255 under the heading "Tests for ordering discovery" that in judicial review proceedings discovery will only be ordered whenever and to the extent that it is necessary to dispose fairly of a particular case or for saving costs. He goes on to say ***"the Courts have, however, pointed out that as the nature of judicial review proceedings is different from ordinary litigation discovery in practice is likely to be ordered in far fewer cases and will be more circumscribed in its extent than would be the case of ordinary private litigation"*** so that when the Greffier in his judgment said that he did not make the ***"usual order for mutual general Discovery"*** on 13th October 1995 because he had received notice from the Solicitor General of her opposition to such an Order being made, he might, perhaps, have contemplated that even if there had not been any opposition, he would still have hesitated before allowing a full private law type Discovery. He may, for instance, have suspected (and we are not saying that there are any grounds for that) that the application was in the form of a "fishing expedition". It is important to note that the representation before us does not apparently plead that the procedures were defective. It challenges merely the result. It is perhaps important, however, to note some comments in de Smith, Woolf & Jowell's "Judicial Review of Administrative Action" (5th Ed'n) which states:

"Discovery

Order 53 explicitly provides for the making of interlocutory applications in respect of discovery of documents, interrogatories and cross-examination of deponents. These were innovations of the 1977 reforms, and they might have amounted to a potentially significant development. This has not been the reality. Unlike proceedings commenced by action, discovery is not automatic and the court retains a discretion to refuse these facilities. In practice, unless the applicant can show a prima facie breach of public duty, discovery will not usually be granted. The courts have, however, encouraged public bodies to adopt the practice of filing an affidavit which discloses all relevant matters.

Where the challenge is on the ground of Wednesbury irrationality, full discovery of the type which is a matter of routine in private law proceedings will seldom be ordered. Applications for discovery "in the hope that

something might turn up" are regarded as an illegitimate exercise, at least in the absence of a prima facie reason to suppose that the deponent's evidence is untruthful. Generally, discovery to go behind the contents of an affidavit will be ordered only if there is some material before the court which suggests that the affidavit is not accurate. Even reports referred to in affidavits, routinely inspected in private law proceedings, will not be the subject of discovery under Order 53 unless the applicant shows that the production of the documents is necessary for fairly disposing of the matter before the court."

If the issues are not to be disclosed in an affidavit because we have no procedure where affidavits are used, then, in our view, they should be clearly stated in the pleadings. If we look at the representation, paragraphs 51, 52 and 53 quite clearly show that the complaint is that the Committee has shown a failure to impose certain conditions and to investigate complaints. The Committee clearly had the power to make the decision that it did under the Banking Laws but, having made those decisions, were they so clearly unreasonable that no Committee would have made them. This Court will not substitute its own opinion for that of the Committee. A helpful pointer as to how this Court can reach a decision is shown in an unreported case R. v Manchester Crown Court *ex parte* Cunningham and Another (19th April 1991) where Mr. Justice Bingham said:

"The applicants seek to challenge the learned judge's decision to refuse to stay, and it is not in issue at this stage before us that this court has jurisdiction to entertain that application. However, the task of the Divisional Court is to look at the material which was before the judge, to look at the submissions which were made to the judge, and to determine whether the judge's decision is shown by the applicants to be unlawful.

On such an application a number of results may eventuate. The court may quash the judge's decision and remit the matter to him for reconsideration. Alternatively, if the court is satisfied that the only proper conclusion that the judge could have reached on the material before him was the opposite of that which he did reach, the court may so declare, and in this case might prohibit the continuance of proceedings. The court might also hold that the grounds of challenge were not made out and in that case it would have no choice but to refuse relief.

It is, however, for the court to make its decision on the material before the judge. In a case such as this the court will know what the material before the judge was and will know the basis of his decision, because he gave a

judgment, and it will then rule on the lawfulness of his decision. The court will not embark on a factual investigation de novo as if to say, "Never mind the judge's decision. We have additional information not available to him. On the strength of that additional information we conclude that the answer is X and not the answer Y which he gave."

Subject to one point, to which I shall return, it seems to me clear that discovery as asked is not necessary to enable the court to carry out its only legitimate task of reviewing whether the learned judge's decision on the abuse application was lawful or not."

The representors do not appear to contend that the Committee did not have sufficient material before it. They had the letters which we have seen in the representation and (although Mr. Sinel did say that this was wholly unsatisfactory), the Committee apparently commissioned a report from Cantrade's auditors, Messrs. Coopers & Lybrand and (whatever the report said) they considered it and on the information available on 21st September 1994, decided not to proceed.

In a case decided on 19th July, 1991, again unreported, R v. Secretary of State for the Environment, *ex parte* Islington London Borough Council and another, the Court of Appeal said this at page 30:-

"It is common ground that since proceedings for judicial review are not begun by writ, general discovery under Order 24, rules 1 and 2 is not automatically applicable. But it is established that an application for discovery may be made in judicial review proceedings under Order 24, rule 3. When such an application is made, Order 24, Rule 8 applies and the court "shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

In the recent case of Dolling-Baker v. Merrett [1990] 1 WLR 1205 Parker LJ commented on the difference of emphasis in the wording between Order 24, rule 8, as quoted above, and Order 24, rule 13, which is concerned with the production of documents and states that "no order for the production of any documents for inspection ... shall be made ... unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter of for saving costs." I doubt if the difference in emphasis is of relevance in the present case. the Crown is likely to claim that certain documents covered by the judge's order, if upheld, are protected from disclosure by public interest immunity; but that is not before us, and

subject to that it would seem that documents of which there is discovery under rule 8 will be produced under rule 13.

The key question is whether under rule 8 discovery is "necessary for disposing fairly of the cause or matter". Henry J directed himself to this question and he answered it, at page 7 of this judgment, as follows:

> *"In this case I would not be confident that I could fairly dispose of this matter simply on the basis of the affidavits because those affidavits raise unanswered questions in my mind. It is still not clear to me why this particular case was treated differently despite having read the affidavits.*
>
> *In those circumstances I would not be confident of fairly disposing of this matter in the absence of discovery and therefore I think that there should be discovery".*

The question for us on this appeal is whether in so answering the question he has transgressed the guidelines on discovery in judicial review cases laid down in previous decisions of this court."

The representation alleges unreasonableness and irrationality. If irrationality is being alleged in fact then the Court would have assumed that it would be apparent on the face of the representation and if the decision is shown to be unreasonable on the face of it then discovery is not necessary.

It is clear on reading the learned Judicial Greffier's judgment that he relied heavily on the case of R v. Lancashire County Council *ex parte* Huddleston (1986) 2 All ER 941.

In our view the case of Huddleston (we shall refer to it as such) is about reasons and not about discovery. Under English procedures the applicant has to file his affidavit before the judge can give leave and the whole basis of that is that there is a duty to make full disclosure. The learned Greffier makes the point at page 7 of his judgment that although the amended answer of the Committee questions status no application for striking out has been brought to date, although the matter was placed on the pending list on 20th December, 1994. The delay has been explained to us by the Solicitor General. As we understand the situation there is now an application to strike out before the Court.

Under Rules 6/13(1)(a) and 6/13(1)(d), that hearing could now take place within one month. It is clear that the learned Greffier has assimilated the concept of the English proceedings in order to follow Huddleston but in our view he goes fundamentally wrong on

page 9 of his judgment. He says that the Representors have not obtained leave to bring the application for judicial review because no such leave is required in Jersey. (That is not quite correct because the representation was considered by the Court on 9th December and consideration of *ex parte* applications on a Friday afternoon is more than a rubber stamping exercise. What is correct is that the Court would not have been able to consider the status of the applicants or the reasonableness of the action on the information then available). However, we find it difficult to agree with his associating the Representor who has not obtained leave in Jersey as being in the same position as an applicant in England who has obtained leave. The part of his judgment which concerns us reads as follows:-

> ***"There is a difficulty here inasmuch that if a Representor is not in the same position as an applicant who has obtained leave in England then unless the matter as to whether they had a sufficient interest in the matter and the other matters which are determined on the application for leave are dealt with in some way as a preliminary issue then the Representor will never obtain the respondent's reasons for the decision. It seems to me that the position in Jersey, until such time as appropriate Rules are passed by the Royal Court, is that a Representor should be treated as being in the same position as a person in England or Wales who has obtained leave and therefore that the dicta in the R v Lancashire County Council should apply."***

The learned Greffier apparently relies on the passage from Huddleston cited at page 6 of his judgment (page 945 of the judgment of Sir John Donaldson MR) as an obligation to give reasons and make discovery. The crucial point is this part of that passage:-

> ***"But in my judgment, the position is quite different if and when the applicant can satisfy a judge of the Public Law Court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure."***

On that passage was founded the principle that if the reasons are inadequate one may be able then to proceed to get disclosure. The Greffier dealt with this at Page 7, of his judgment:-

> ***"However, in England the application for leave is made ex parte, unless the Court otherwise orders, and there does not appear to be any right thereafter to apply for the striking out of the application for Judicial Review although a Respondent can apply for the grant of leave to be set aside but such applications are discouraged and***

should only be made where the Respondent can show that the substantive application will clearly fail (see Section 53/1-14/2 of the 1995 White Book at sub-section 3."

It seems to us both difficult and unnecessary to attempt to assimilate the two systems into a satisfactory *modus operandi*. The Greffier (and we hope that we are not doing him an injustice) apparently has implied that the reluctance of the Committee in not attacking status for a considerable time is somehow equivalent to a judge in England considering status (amongst other matters) and thereafter giving leave to proceed to stage two of the English procedure. The argument appears to be that a representor who has met an opponent who has taken no steps to strike out, with no enquiry as to whether the delay is justified and although it has queried the position of status, should be thereby assimilated to a party in England whose case has been scrutinised in England and given consent. That is, in our view, an untenable conclusion. If it is correct, the results could be bizarre, because the principles of Huddleston would become generally applicable and a decision of the Greffier would, at a stroke, have over-ruled the Superior Number . Against that, of course, are the not unimportant words at the end of the passage cited in the judgment of the Master of the Rolls. We need to repeat them because we shall deal with that aspect later in this judgment:-

"In proceedings for Judicial Review, the applicant no doubt has an axe to grind. This should not be true of the authority."

If Huddleston is applied then apparently by a side-wind the learned Greffier has created on an English procedural basis a procedure which virtually requires the Committee to give its decision.That situation could logically arise where the Statute gives no right of appeal. We need only refer to Daisy Hill Real Estates Limited v. The Rent Control Tribunal *(supra)* to see how problematic the position could be:

"There is, of course, no appeal from a decision of the Rent Control Tribunal. "See Macready v. Amy (1950) JJ 11). Mr. Bailhache referred us to the Appeal of Mr. John Dixon Habin under Regulation 10 of the Gambling (Licensing Provisions)(Jersey) Regulations, 1965, (1971) JJ 1637 where the learned Bailiff said at 1649:-

> ***"The first principle to emerge, therefore, is that in those enacted Laws constituting an authority and which contain no appeal provisions, that authority need give no reasons for its decision and its decision cannot be impugned in a Court of Justice, unless, perhaps, it could be demonstrated that the decision was made in total disregard of the interests of the public in general."***

Mr. Bailhache told us that part of the judgment of the Superior Number was so plainly wrong that it could not be binding upon us, particularly as the Superior Number has only one judge of law, albeit eight judges of fact. But as H.M. Solicitor General argued this interlocutory hearing is no place to decide whether the actual procedures can be impugned rather than the decision. We have carefully regarded Housing Committee v. Phantesie Investments (1985-86) JLR 96, and R. v. Civil Service Appeal Board ex parte Cunningham (1991) 4 All ER 310. These cases raise important issues which the court of trial will no doubt have to grasp.

The authority in this jurisdiction, at present, is against the Tribunal having to justify its decision. We feel that while the reasons given by the Tribunal seem at times to ask more questions than they answer, it is not the purpose of further and better particulars to cause the Tribunal to have to make a full declaration of its policy. We cannot fault the learned Greffier's decision. This Court is not yet certain of whether the Tribunal is bound in law to supply any reason for its decision and will remain uncertain until the whole matter has been fully resolved at trial."

If this decision stands then an English case based on different procedures may be followed in future to compel the Committee to give reasons. The Solicitor General felt that on this point, the learned Greffier misdirected himself. We agree. She went on to say that there should be no discovery ordered at all until the standing of the proceedings and status of the representors had been resolved. If there were no status then clearly, there could be no discovery. The learned Greffier only persuaded himself to order discovery by applying Huddleston, even though the crucial point stressed by the Master of the Rolls in that case was that the applicant had obtained leave and had satisfied him as to status before he made his decision. She asks that the matter be adjourned until the matter of status can be determined. We are able to reject the learned Greffier's decision on the basis upon which he founded it. We need to examine in more detail the consequences of that decision and whether the gates are shut to any discovery procedure at all.

As matters proceeded before us, events have taken a strange turn. Stung by some of her opponent's comments, the Solicitor General has now given us a clearer picture of some of the matters that were troubling us.

In R. v. Civil Service Appeal Board, *ex parte* Cunningham (1991) 4 All ER 310 CofA, the Court of Appeal in its judgment said certain things upon which we can rely. The judgment arose out of a

judicial review from a decision of the Civil Service Appeal Board. There being no right of appeal from the Board's decision, leave (following the methods of the English Courts) was granted by a judge for the applicant to apply for a judicial review. In the course of its judgment the Court said this at page 315:

> *"Those of us with experience of judicial review are very much aware that the scope of the authority of decision-makers can vary very widely and so long as that authority is not exceeded it is not for the courts to intervene. They and not the courts are the decision-makers in terms of policy. They and not the courts are the judges in the case of judicial or quasi-judicial decisions which are lawful. The public law jurisdiction of the courts is supervisory and not appellate in character. All this is very much present to the minds of judges who are asked to give leave to apply for judicial review. Such leave will only be granted if the applicant makes out a prima facie case that something has gone wrong of a nature and extent which might call for the exercise of the judicial review jurisdiction. Whatever the initial position, the fact that leave to apply for judicial review has been granted calls for some reply from the respondent. How detailed that reply should be will depend upon the circumstances of the particular case. He does not have to justify the merits of his decision, but he does have to dispel the prima facie case that it was unlawful, something which would not arise if leave to appeal had been refused."*

Natural justice as was said by Lord Norris in Wiseman v. Borneman (1969) 3 All ER 275 is no more than ***"fair play in action"***.

Apparently to justify its decision the Committee, in the final paragraph of its answer said:-

> *"The prayer of the representation asks that the respondent be condemned to suspend the activities of Cantrade pending the completion of any investigation. Cantrade was first registered as a deposit taker on the 27th march, 1979, under the Depositors and Investors (Prevention of Fraud)(Jersey) Law, 1967. It has continued to be authorised on an annual basis. As at the 30th September, 1994, Cantrade had customer deposits in excess of £1 billion and as at the 30th June, 1995, £1.5 billion. It offers a wide range of services to customers of a private banking and investment nature, both on a personal and fiduciary basis. It has built up a reputation with its clients during its sixteen year operation in the Island. It would be totally unreasonable to suspend the activities of Cantrade at the present time and would moreover have a damaging effect on the many depositors and other customers*

who rely upon its services. As a wholly owned subsidiary of the Union Bank of Switzerland which has capital and reserves in excess of 22.8 billion Swiss francs as at the 30th June, 1995 and is rated the tenth largest bank in the world on the basis of its capital strength, Cantrade is part of one of the strongest international banking groups. The Union Bank of Switzerland is also one of the few "AAA" rate banks operating in the world. Cantrade through its association with the Union Bank of Switzerland also manages two other subsidiaries of the Union Bank of Switzerland in Jersey, BDL Banco di Lugano and Schweizerisch Hypotheken-und-Handelsbank and a branch of the Union Bank of Switzerland whose customers would be similarly disadvantaged if Cantrade's activities in Jersey were to be suspended."

That may well be an example of the principle *"cet animal est très méchant: quand on l'attague il se défend"*, but there is substance in it.

When we read the representation and particularly those letters contained within paragraphs 39 to 49 we are left with the impression that the Committee is totally disinterested in the questions raised and it was implied by Mr. Sinel, whose unfounded and immature attacks on the whole system of justice in this island was regrettable, that the Committee was more intent on protecting Cantrade and its own image than examining what may well be serious allegations. The further correspondence put in by the Solicitor General leads us to believe that Mr. Sinel has not provided us with the full story.

On 30th January, 1995, he wrote to the Attorney General in these terms:-

"We acknowledge receipt of a copy of your letter of 23rd January 1995. We feel that your letter could have been more forthright. Mr. McGuire in common with a number of other investors has received letters from the States of Jersey Finance & Economics Committee which are best described as duplicitous. There is no criminal investigation into the activities of Cantrade and no complaint of the activities of Cantrade has been made to the police. We have discussed this matter with our clients and we have advised them not to complain to the police of the activities of Cantrade as a criminal investigation could well lead to a stay of the civil proceedings."

On 12th September, 1995, at a meeting held between D.I.Hopper, Crown Advocate Pallot and Advocate Sinel and his accountant, there is a minute of a long and detailed meeting which we will not set out in any great detail except to cite the two passages read by the Solicitor General:

"DIH referred to the unauthorised trades on the TTSI a/c (which Young had spoken about on the taped conversations with PCS in February) and said that in discussion with Ian Wright (the forensic accountant retained by the Police) they concluded that it would be virtually impossible to prove on account of the lack of concrete records and the absence of records as to the times of the deals. In addition any investigation would be prohibitively expensive. It was difficult to establish which did which deal and when the deal was closed. The Bank had admitted that their records were sparse. ....

D.I.Hopper made the point that the investigation had started in Jan 1994 and that they had spoken at length before with the Bank. The allegations were he felt "late in the game".

He had asked I Wright for a separate report regarding the false commissions and if we wanted things to go further with Cantrade we would need to officially request a broadening of the investigation to encompass in Article 22 investigation [NB this has been done]."

On 25th September, 1995, Mr. Sinel who criticised the Attorney General in Court for not having progressed the investigation wrote this:

"....If you are minded to authorise such an investigation we feel that we can produce strong and compelling evidence by way of statements from Messrs. Kawasaki, Cerny, Lee, Michael Marsh and Myles Stott, furthermore we can provide a transcript of the 1993 seminar and copies of the promotional material produced by our clients referring to the proposed arrangement with Cantrade as being one which involved little risk for the investors. It being beyond per-adventure that Cantrade received copies of this promotional material.

It has been suggested that you may ask the financial Services Department to investigate our allegations in relation to Article 22 of the Banking Business (Jersey) Law 1991. This would be an exercise in futility as it is quite clear to us from our contacts with the Finance & Economics Committee and the Financial Services Department that they have no wish to investigate the extent or any allegations being made by our clients."

And then, on 27th November, 1995, again in a very detailed letter from Mr. Sinel to the Attorney General appears this scandalous suggestion:

"Criminal Investigation of Cantrade Private Bank (Jersey) Limited - Bribery - Breaches of Article 22 of the Banking Business (Jersey) Law 1991

This firm's state of knowledge in relation to the malfeasances of Cantrade has been greatly enhanced over the last few months and we are now in a position to file detailed statements of evidence on behalf of individuals and corporations who were the victims of Cantrade's criminal conduct and whose cumulative losses may be measured in millions of dollars. The complainants are persons of substance and repute from many jurisdictions who expect justice to be done and be seen to be done in this jurisdiction in the same way that they would expect it to be done in their own jurisdictions.

On the 24th October 1995 Advocate Sinel and Mr. Poole of this firm had a constructive meeting with, inter alia, Crown Advocate Whelan and Detective Inspector Hopper at which they discussed, inter alia, the intention of this firm to file additional complaints in the form of witness statements. We have been now appointed as the agent of various individuals whom we did not previously represent for the purpose of so doing. It was pointed out to us by Crown Officer Whelan and Detective Inspector Hopper that only the Finance & Economics Committee have the statutory powers necessary to investigate adequately complaints of this nature, it was then suggested to Advocate Sinel that witness statements should be sent simultaneously to crown Advocate Whelan and the defaulting Committee in order that your office could render appropriate simultaneous advice to the defaulting Committee.

Whilst we are grateful to Crown Advocate Whelan for his helpful professionalism such a course of action is not appropriate whilst your office continues to represent the defaulting Committee. In short the complainants are reluctant to approach Her Majesty's Attorney General with complaints of a criminal nature because the offices of Her Majesty's Attorney General are being used to assist the defaulting Committee in resiling from its responsibilities under the Banking Business (Jersey) Law 1991, and in so doing Her Majesty's Attorney General is rendering assistance to an organisation which is, prima facie, guilty of serious criminal misconduct."

On 8th October, 1995, Mr. Sinel received a letter from H.M. Solicitor General. She read it to us in her reply. In our view, we should have known of its existence early on in these proceedings. It reads:

"Dear Advocate Sinel,

Mayo Associates SA and Others V Finance and Economics Committee

I write in answer to your letter of the 11th September, 1995, which says that you are taking the opportunity to give my client Committee time to reconsider its position.

I take "reconsider its position" to mean accede to what is sought in the prayer of your clients' representation. I do not propose to set the prayer out in full, but the numbers which follow correspond with the numbers of the paragraphs of the prayer in the representation as amended.

(1) As you are aware from the particulars the Committee called for a

&

(2) report. It requested Cantrade to commission an auditors' report in accordance with Article 25 of the Law. That report indicated that no further action on the part of the Committee was required.

In other words, the Committee has exercised its powers to investigate the activities complained of.

(3) As this part of the prayer is a request for suspension pending the completion of such investigation, and the investigation has been completed, the request falls away.

(4) The auditor's report indicated that no action was called for on the part of the Committee. The Committee, having considered that report, sees no reason to differ from it.

As a more general comment, this part of the prayer is in any event insufficiently precise in as much as it does not specify what it is the Committee is requested to do in pursuance of Article 10.

Can I take this opportunity of mentioning your letter of the 13th June, 1995, which referred to the report and asked whether the committee had decided to take any action in the light of it? This was unfortunately filed unanswered, for which I must apologise. It has now been answered by this letter.

Yours sincerely,
S.C.Nicolle
Solicitor General"

We have not examined the provisions of Article 41 of the Banking Business (Jersey) Law 1991 nor, in particular, of the effect of Article 44 upon it. Any argument upon that point is reserved by Counsel dependent upon the decision.

We are not satisfied that this is merely a fishing expedition. There are matters which call out for explanation on both sides. If, as he says, Mr. Sinel's clients hold better and more detailed information than they did when he first approached the Committee then he should make that information known. The Committee cannot act further without it.

We are prepared to order a limited form of discovery. The limits to be imposed on that mutual discovery will be decided by us at an adjourned hearing. We cannot progress the matter until it be established whether or not the representors can bring the action. If Mr. Sinel is right then the hearing will be a short one. We order a stay of four weeks until the matters under the striking out application now before the Court are decided. If no decision has been made on the summons within four weeks, Counsel have leave to appear before us to seek an extension of time. We have to say that there will have to be cogent reasons put before us to establish good cause.

Authorities

Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680; [1947] 1 LT 641; 63 TLR 623; 117 LJR 190; 45 LGR 635; 112 JP 5; 92 Sol Jo. 26.

Jersey Civil Service Association & 2/300 Branch in Jersey of the Association of Clerical, Technical, and Supervisory Staff (24th November, 1994) Jersey Unreported.

Daisy Hill Real Estates Ltd -v- Rent Control Tribunal (8th June, 1995) Jersey Unreported.

Mayo Associates & Ors. -v- Anagram (Bermuda) Ltd & Ors. (23rd June, 1996) Jersey Unreported CofA.

R.S.C. (1995 Ed'n): O.53 r.3; O.24 R.2, 8, 13.

Royal Court Rules 1992, as amended: 6/16.

Victor Hanby Associates -v- Oliver (1990) JLR 337 CofA.

Lewis: "Judicial Remedies in Public Law": Chapter 9: Introduction: pp.254-7.

Supperstone & Goudie: "Judicial Review" (1992 Ed'n): pp.368-9.

de Smith, Woolff, & Jowell: "Judicial Review of Administrative Action" (5th Ed'n): p.870.

R. -v- Manchester Crown Court *ex parte* Cunningham & Anor. (19th April, 1991) Unreported Judgment of the High Court of England.

R. -v- Secretary of State for the Environment *ex parte* (19th July, 1991) Unreported Judgment of the Court of Appeal of England.

R. -v- Lancashire County Council *ex parte* Huddleston (1986) 2 All ER 941.

R. -v- Civil Service Appeal Board *ex parte* Cunningham (1991) 4 All ER 310 CA.

Wiseman -v- Borneman (1969) 3 All ER 275.

Matthews & Malek: "Discovery": pp.51-2.

R. -v- General Council of the Bar *ex parte* Percival (1991) 1 QB 212.