8 pages.

ROYAL COURT
(Samedi Division)

154.

29th & 30th August, 1996.

P.R. Le Cras, Esq., Lieutenant Bailiff,
Single Judge.

Between:	Pacific Investments Limited	Plaintiff
And:	Robert Christensen	First Defendant
And:	Alison Mary Holland	Second Defendant
And:	Michael Allardice	Third Defendant
And:	Graeme Elliott	Fourth Defendant
And:	Firmandale Investments Limited	Fifth Defendant
And:	James Hardie Industries Limited	Sixth Defendant
And:	James Hardie Finance Limited	Seventh Defendant
And:	Govett American Endeavour Fund Limited	Eighth Defendant

Advocate N.F. Journeaux for the Plaintiff.
Advocate W.J. Bailhache for the First, Second, Third, Fourth, and Eighth Defendants,
Advocate A.D. Hoy for the Fifth Defendant,
Advocate R.J. Michel for the Sixth and Seventh Defendants.

---

(1) Application by the Plaintiff for an Order staying the proceedings.

(2) Application by the Plaintiff for leave to cross-examine the First Defendant on his Affidavit.

(3) Application by the First, Second, Third, Fourth, and Eighth Defendants for an adjournment of the Plaintiff's application for specific discovery.

JUDGMENT
(on the Plaintiff's application for a stay of the proceedings.)
(Judgment delivered on 29th August, 1996)

THE LIEUTENANT BAILIFF: There are before the Court today a series of four summonses and a Representation, all brought by the Plaintiff. By agreement between the parties, the Plaintiff's summons for a stay of the proceedings came on first, this on the ground that if it were wholly successful the remaining applications would stand over.

Mr. Journeaux for the Plaintiff submitted (see 4 Halsbury 37 paras. 437-446) that the Court in this instance was to act under its inherent jurisdiction. An order should be made where it is just and convenient to do so. He accepted, as the Court thought he must, that in the exercise of the Court's inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.

The principle he submitted here was that of parallel proceedings (see Department of Trade and Industry -v- British Aerospace plc & Rover Group Holdings plc [1991] 1 CMLR 165). Here the stay was sought because the Plaintiff's took the view that the original relief sought i.e. the change of the Fund's board had to be achieved quickly if it were to be achieved at all; and that this was now no longer achievable, on account of the length of time which had expired. The Plaintiff nonetheless wished to keep the proceedings in being as it still felt strongly that the Defendants had behaved with impropriety; that the company had been hopelessly mismanaged; and that the Plaintiff's claims would hold good.

The allegations were substantially the same in The American Endeavour Fund Ltd -v- Trueger & Ors. (26th July, 1996) Jersey Unreported and, by his estimate, some 90% of the findings of fact in both actions might overlap. In those circumstances his clients were content to be bound by the facts in the Fund action where there was an overlap.

Here the Defendants were seeking a strike out, or a partial strike out or a stay; and the First to the Fourth Defendants at least would accept a stay if the strike out failed.

In those circumstances there was no need for the Court to bother. Litigation was under the control of the Court not the parties (see Ashmore -v- Corp of Lloyds [1992] 2 All ER 486). There was no direct benefit to the Defendants if they proceed which would not be available to them after the trial of the Fund action. There would merely be a duplication of costs. Nothing in the interests of justice requires to be served by continuing the strike out application at this stage and all the parties are better served by a stay.

As to the grounds on which the strike out application is brought, there were, he agreed, two lines of argument put forward by the First to the Fourth Defendants.

The first was the ratification point (see Smith & Ors. -v- Croft & Ors. (No. 2) [1987] 3 All ER 909), that is that where a majority of the independent minority shareholders were given a clear picture and

ratified the decision of the Board, then the Company cannot through one minority dissenting shareholder continue.

His case was that this line of argument would stand or fall on the matters of fact found in the Fund action. The Plaintiff says that the circular sent to the shareholders was misleading and inaccurate and cannot form a proper basis for their decision. This would depend on the facts and if heard first would cover the same ground as the Fund action with the possibility of an overlap and of different findings of fact in separate courts, a guaranteed recipe for confusion.

In his answer Mr. Bailache submitted that there was a second ground to strike out, on which Mr. Journeaux had made no submissions. This is that there is an abuse of proceedings in that the Plaintiff brings them as the alter ego of the Govett Group and that the proceedings are not designed to achieve the ends which they purport to achieve viz. that the Plaintiff is put up to bring proceedings for the ends of another person not themselves a party. The test here, he submitted, would be that as set out in Barrett -v- Duckett & Ors. [1995] 1 BCLC 244 CA. None of the issues in this application appear to be relevant to the issues in the Fund action, where the evidence may have some bearing on the credit of witnesses. There should be no finding of fact on this relevant to the issues in the Fund action. In addition there may well be submissions on the issue of champertous behaviour.

So far as the second ground is concerned (that is that on which Mr. Journeaux made submissions) it is based on the decision of the Extraordinary General Meeting.

The question, in his view for the Court, was whether the shareholders had sufficient information. The entire action would not have to be heard to ascertain this. The Court will not have to ascertain the truth of the circulars, but merely whether the circulars gave sufficient information. If the Court is unhappy with the circulars or with the evidence (if any) it would simply send the action to a hearing and a full trial. The question was, was the Extraordinary General Meeting meaningful, or, put another way, were the allegations in the Order of Justice fairly put, so that the shareholders had sufficient information to make a reliable decision? If they had, and so decided, that should *ipso facto* end the matter or every such application would have to be heard out in full.

The parties only legitimate expectation was to receive justice (see Ashmore -v- Corp of Lloyds) [1992] 2 All ER 493 g-h. It would be unjust to have a stay before the strike out application were heard. The Directors were entitled to know where they stand and the proper interest of justice was that the application should proceed.

In reply Mr. Journeaux disagreed as to whether the argument could be confined to the circular. In his submission the circular fails to disclose the nature of the relationship and is flawed as being made by Directors against whom serious allegations have been made.

Evidence will be brought before the Court and the Plaintiff will seek to widen the application. The Court will have to make a finding on the facts, and the argument his clients will seek to put is not confined to the circular.

As to abuse of process, the better authority is Broxton -v- McClelland & Anor. (10th January, 1995) Unreported Judgment of the Court of Appeal of England, and especially the remarks at paragraph 3 on p.8.

If the Defendants win on the abuse of process point and the Plaintiff disproves the allegations in the Fund action, the Defendants will have gained an unfair advantage.

Last, there is no real disadvantage to the Directors to wait, they are being sued for four hundred and fifty million dollars in the Fund action.

All in all, as a stay will be sought if the strike out application fails and the action is unlikely to come to trial the disadvantage of weeks of hearing, allied to the other points put by him bear more weight in the scales than the arguments put by the First to the Fourth Defendants.

Nonetheless, despite the arguments put by the Plaintiff the Court, in the exercise of its discretion, refuses the application for a stay.

There seems to the Court to be no exceptional circumstances nor even any sufficient reason which would justify a stay being granted which outweigh the First to the Fourth Defendants' interests in testing whether this action should have been brought at all.

As the Court understands the position there is no real likelihood of parallel proceedings nor any real prospect of any overlapping findings of fact which would justify a stay.

The Court wishes to add further that the summons for a strike out was issued last year and the Order in which the case was to be heard was fixed as long ago as 8th September, 1995, and the Court sees no good reason why it should not now proceed.

The Plaintiff's summons for a stay is therefore dismissed.

JUDGMENT
(on the Plaintiff's application for leave to cross-examine the First Defendant on his Affidavit.)
(Judgment delivered on 30th August, 1996)

THE LIEUTENANT BAILIFF: This summons is one for an order for Mr. Christensen to appear and to be cross-examined, the summons reading:

"Let the First, Second, Third, Fourth and Fifth Defendant or their Advocates appear before the Royal Court on the 28th day of August, 1996, at 10 o'clock in the forenoon to show cause why the Royal Court should not make the following Orders:-

1. That at the hearing of the Summonses of the First, Second, Third, Fourth and Fifth Defendants to strike-out and/or stay the Plaintiff's Order of Justice Mr. Robert Anthony Christensen, the Deponent of Affidavits sworn on behalf of himself and the Second, Third and Fourth Defendants in or

about these proceedings be ordered to appear to be sworn as a witness and be examined and cross-examined as to the statements made by him in the said Affidavits and upon any other Affidavit sworn by him herein as at the date hereof upon which the First, Second, Third, Fourth and/or Fifth Defendants may seek to rely at the said hearing;

2. *That the First, Second, Third, Fourth and Fifth Defendants do pay to the Plaintiff the Plaintiff's costs of and incidental to this application.*

And why the Court should not make such further Order as it sees fit in all the circumstances of the case".

The application has been strongly resisted by the First to the Fourth and the Fifth Defendants, and for that reason the Court feels compelled, in fairness, to do more than merely announce its decision.

First, both parties agreed that the Court had a discretion, and that that discretion should be exercised within the guidelines set out in Arya Holdings Ltd -v- Minories Finance Ltd (31st October, 1991) Jersey Unreported; [1991] JLR N.2. The discretion is a wide one, and although in practice cross-examination does not often take place on an interlocutory application, it did so in that case.

The application must be genuine, or, as the learned Deputy Bailiff preferred it, *"bona fide"*, and the Court was referred to the remarks at p.6 of Cross LJ:

> *"It is, I think, only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit".*

Mr. Journeaux submitted that the strike out application was not straightforward; that Mr. Christensen could not have believed in the accuracy of the circular and the Court should order the cross-examination provided that such examination is relevant to the application.

He proceeded to give examples which the Court sees no need at this stage to set out in detail. In essence they come to this, that while the affidavits and the circular sent to the shareholders prior to the Extraordinary General Meeting are internally (as it were) consistent, there are inconsistencies between them and other documents produced on discovery which require an explanation; and which are relevant to that part of the strike out application.

Mr. Bailhache attacked the Plaintiff's *bona fides* in general and particularly with regard to the Extraordinary General Meeting when the Plaintiff might have put its case in more detail to the shareholders.

Furthermore, there was nothing that the cross-examination would produce which would be relevant. The sole object of this application is to widen the issues at the strike out and try to convert it to a full trial.

That may be so, but that is not of itself a reason to refuse an order today. At the trial it will be for the Judge who conducts it to decide what is relevant. Equally the allegations of *mala fides* against the Plaintiffs do not *ipso facto* convert this application into one which is not *bona fide*.

There are documents before the Court upon which, at this stage, it appears to be quite proper for the Plaintiff to cross-examine Mr. Christensen on his statements and the Court finds the application to be *bona fide*. Even without taking the very important statement of Cross LJ into account the Court finds the application a proper one and makes the order as sought by the summons.

JUDGMENT
(on the Application by the First, Second, Third, Fourth, and Eighth Defendants for an adjournment of the Plaintiff's application for specific discovery.)
(Judgment delivered on 30th August, 1996)

THE LIEUTENANT BAILIFF: The fourth summons in this series requests an order for:

"LET the First, Second, Third, Fourth and Eighth Defendants or their Advocates appear before the Royal Court on the 28th day of August, 1996, at 10 o'clock in the forenoon to show cause why the Royal Court should not make the following Orders:

1. *That the First, Second, Third, Fourth and Eighth Defendants do, in accordance with Rule 6/16(1) of the Royal Court Rules 1992, (as amended), within 28 days of the date of this Order, furnish the Plaintiff with a list of documents which are or have been in their possession, custody or power which deal with, refer or relate to or evidence:*

   (a) *The indemnification of the Directors of the Eighth Defendant (hereinafter called "the Fund"):*

   (b) *Any control or influence exerted or attempted to be exerted by the Sixth and/or Seventh Defendants and/or their officers, servants or agents over the affairs of the Fund:*

   (c) *The decision of the Directors of the Fund to terminate the appointment of Berkeley Govett International Limited ("BGIL") as the manager of the Fund:*

   (d) *The contents of the circular to the Fund's shareholders sent by the Directors of the Fund dated 11th August, 1995, in particular (and without prejudice to the generality of the foregoing) communications between the Directors of the Fund or any of them and/or the Fund on the one part, and the Fund's professional advisers concerning the proposed terms of the said circular:*

(e) The fees taken by BGIL as manager of the Fund and the knowledge of the Directors of the Fund of those fees: and

verify such lists by Affidavits.

2. That the First, Second, Third, Fourth and Eighth Defendants do pay to the Plaintiff the Plaintiff's costs of and incidental to this application.

And why the Royal Court should not make further Order as it sees fit in all the circumstances of the case".

At the hearing Mr. Journeaux for the Plaintiff requested that the delay in producing the papers be reduced from 28 to 14 days. This was resisted by Mr. Bailhache who advised the Court that it would be difficult to comply with the order even in 56 days, in view of the large amount of material which would fall to be examined, much of which might not fall within the terms of the summons.

Furthermore, on consideration of the finding made earlier today when an order was made for the cross-examination of Mr. Christensen, the Defendants might only seek to advance the ground of abuse of process; in which case a vast amount of work would have been done for nothing. In those circumstances he submitted that this summons should be left over for the trial Judge. He further submitted that if the Judge finds that discovery should have been made, then he would halt the case on that particular ground.

The full case had not been argued; and only a sketch outline produced, and it was too soon to say whether or not the discovery sought was necessary.

Mr. Journeaux submitted that the Court should take the position as being that as presently outlined.

The point is a difficult one, as the Court has to balance the desire to have everything ready for trial against that of not requiring parties to produce papers which may not be required should a particular line of argument be abandoned.

Mr. Bailhache clearly wishes - given the order made with regard to Mr. Christensen - to consider his position and is not in a position to commit himself today. This is understandable, but at some point, and fairly soon he has, as the Court recalls, to give an indication of his arguments to the other side.

When the Plaintiff sees the grounds on which the application to strike out is to proceed and can form a view as to whether, in his opinion, the documents sought are relevant then he will be in a position to abandon or to renew this application.

The summons is therefore stood over with leave to apply on 48 hours notice after the delivery of the skeleton argument of the First to the Fourth Defendants.

Authorities.
(the Plaintiff's application for a stay of the proceedings.)

4 Halsbury 37: paras 437-446.

Department of Trade and Industry -v- British Aerospace plc & Rover Group Holdings plc [1991] 1 CMLR 165.

The American Endeavour Fund Ltd -v- Trueger & Ors. (26th July, 1996) Jersey Unreported.

Ashmore -v- Corp of Lloyds [1992] 2 All ER 486.

Smith & Ors. -v- Croft & Ors. (No. 2) [1987] 3 All ER 909.

Barrett -v- Duckett & Ors. [1995] 1 BCLC 244 CA.

Broxton -v- McClelland & Anor. (10th January, 1995) Unreported Judgment of the Court of Appeal of England.

Slough Estates Ltd -v- Slough Borough Council & Anor. [1967] 2 All ER 270.

Royal Bank of Scotland Ltd -v- Citrusdal Investments Ltd [1971] 3 All ER 558.

(the Plaintiff's application for leave to cross-examine the First Defendant on his Affidavit.)

Arya Holdings Ltd -v- Minories Finance Ltd (31st October, 1991) Jersey Unreported; [1991] JLR N.2.

(the Application by the First, Second, Third, Fourth, and Eighth Defendants for an adjournment of the Plaintiff's application for specific discovery.)

No Authorities.