

ROYAL COURT  
(Samedi Division)

18th May, 1994

101.

Before: The Bailiff,  
and Jurats Orchard and Rumfitt

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<u>Between:</u>	Kim Kawasaki	<u>First Plaintiff</u>
<u>And:</u>	Steven Cerney	<u>Second Plaintiff</u>
<u>And:</u>	Geoffrey Lee	<u>Third Plaintiff</u>
<u>And:</u>	Mayo Associates S.A.	<u>First Defendant</u>
<u>And:</u>	Troy Associates Limited	<u>Second Defendant</u>
<u>And:</u>	T.T.S. International S.A.	<u>Third Defendant</u>
<u>And:</u>	Michael Gordon Marsh	<u>Fourth Defendant</u>
<u>And:</u>	Myles Tweedale Stott	<u>Fifth Defendant</u>
<u>And:</u>	Monica Gabrielli	<u>Sixth Defendant</u>
<u>And:</u>	Cantrade Private Bank Switzerland (C.I.) Limited	<u>Party Cited</u>

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Application by the Defendants for an Order:

- (1) setting aside the Orders of the Judicial Greffier of 14th February, and 8th March, 1994 allowing service out of the jurisdiction; and/or
- (2) striking out the action.

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Advocate P.C. Sinel for the Defendants.  
Advocate W.J. Bailhache for the Plaintiffs.  
The Party Cited did not appear and was not represented.

**THE BAILIFF:** It is not necessary for the Court to repeat the very full summary of the background to this case which is set out in the Court of Appeal's judgment of 29th April, 1994.

What we have to decide now is whether the Order of the Judicial Greffier on 14th February, to allow service outside the jurisdiction upon the Defendants, should be upheld or not.

Looking at the R.S.C. (1993 Ed'n) we see on page 96 at paragraph 11/4/3, on the question of the affidavit, that there are four requirements in relation to the affidavit.

**"(a) The affidavit should be sufficiently full to show that the plaintiff has a good arguable case for the relief claimed. Drafts of the writ and statement of claim should be exhibited in all but the simplest cases. Copies of the documents pleaded should be exhibited."**

Well, we were told this afternoon that what the Greffier had before him was an affidavit by Advocate O'Connell and the Order of Justice to which was attached the contracts between the Plaintiffs and the Defendants.

**"(b) The affidavit must make clear which sub-rule of r.1(1) is relied on."**

Well, we do not have quite the same detailed rules so that is not really relevant.

**"(c) The affidavit must be frank. If any material fact is omitted this itself would justify the court in discharging the order, even though the party might later be in position to apply again (The Hagen [1908] P.189, p.201, C.A.)"**

**(d) Leave is usually given to serve in a particular country. If it turns out that the defendant is in a country other than that named in the order, application to amend the order and if necessary, the writ and concurrent writ should be made ex parte to the Practice Master on affidavit."**

Again that is not relevant. The extract goes on:

**"The rest of a good arguable case which the plaintiff had to show under O.11, r.4 (2) before a court would give leave to serve a defendant out of the jurisdiction was not to be applied rigorously in complete isolation of**

*other aspects of the case. In order to satisfy the court that there was "a good arguable claim on the merits" there was a three stage enquiry. Firstly the court has to be satisfied that there was at least a strong possibility that the case fell within O.11, r.1 (1)..."*

That is not really applicable here because it is not disputed that the case could fall within it, with our own rule.

*"...secondly that England was the appropriate forum and thirdly, if these conditions were satisfied, that there was a "good arguable case". The best guide of the minimum standard required to meet this requirement was to be found in O.11, r 4 (1) (d) namely "a real issue which the plaintiff may reasonably ask the court to try"."*

Mr. Sinel has conceded that there might well have been a reasonable case for the Court to try.

However, he rests his main submission on the fact that although there was attached to the Order of Justice the agreements which contained a particular clause relating to where any dispute should be dealt with, that paragraph in the agreement was not specifically drawn to the learned Greffier's attention.

The agreement is subject to the following qualification which I now read.

*"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, Switzerland."*

In our view the words "any dispute" is very clear. Mr. Bailhache submitted that that did not necessarily mean exclusively but would entitle a dispute to be dealt with outside the Swiss jurisdiction. However, on page 11 of the Court of Appeal judgement we find the following paragraph starting at the bottom of page 10.

*"Under the injunctions which they obtained on 9th February.. that is the Plaintiff"..they were given before those injunctions were discharged on 24th March, full details of all accounts held by Cantrade in which they have interests*

held 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 contract with Mayo (or FTS) are to be construed in accordance with the 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."

It is perfectly clear that there is an admission by Advocate O'Connell there, that that qualification is applicable and is in fact not supportive of the argument advanced by Mr. Bailhache this afternoon.

It is quite clear to us from the judgment of Mr. Commissioner Le Cras and the Jurats sitting with him on 24th March, that the injunctions which were obtained when I, as Bailiff, signed the Order of Justice in February were discharged for the reason that they had incomplete, and not full and frank, disclosure. We cannot say whether, had the Greffier been informed and his attention drawn very carefully and fully, as it should have been in our opinion, to that clause as regards where a dispute should be heard, that he would, of necessity, have granted the application.

Accordingly we find there was not sufficient full and frank disclosure to the Greffier and his Order is set aside.

**AUTHORITIES.**

Service of Process & Taking of Evidence (Jersey Law, 1960: Part I:  
Article 2.

Service of Process (Jersey) Rules, 1961: Part II: Rules 5,6,7, &  
9.

R.S.C. (1993 Ed'n): O.11, r.1,4.  
O.12, r.8.

4 Halsbury 37: paragraphs 171-193: pp. 134-145.

Cheshire & North's Private International Law (12th Ed'n): pp. 203-  
210.

Newtherapeutics Ltd. -v- Katz & Ors. [1990] 2 All ER 151.

Royal Court Rules 1992: 6/13.

MacKender & Ors. -v- Feldia & Ors. (1966) 3 All ER 847 C.A.

Re Jogia (a bankrupt) ex parte the Trustee -v- D. Pennelier &  
Company, Ltd.