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COURT OF APPEAL 145.

Decision: 12th July, 1996.
Reasoned Judgment: 2nd August, 1996.

Before: J.M. Collins, Esq., Q.C., (President),
R.D. Harman, Esq., Q.C., and
Sir Peter Crill, K.B.E.,

Between	Mayo Associates S.A.	First Plaintiff
	Troy Associates Limited	Second Plaintiff
	T.T.S. International S.A.	Third Plaintiff
And	Cantrade Private Bank Switzerland (C.I.) Limited	First Defendant
And	Touche Ross & Co. (being the party listed in Exhibit A to the Order of Justice.)	Second Defendant
And	Robert John Young (joined at the instance of the First Defendant)	First Third Party
	Anagram (Bermuda) Limited (joined at the instance of the First Defendant)	Second Third Party
	Myles Tweedale Stott (joined at the instance of the First Defendant)	Third Third Party
	Michael Gordon Marsh (joined at the instance of the First Defendant)	Fourth Third Party
	Monica Gabrielli (joined at the instance of the First Defendant)	Fifth Third Party
	Touche Ross & Co. (joined at the instance of the First Defendant)	Sixth Third Party

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Application by the First Defendant for an Order staying the action, as against the First Defendant, pending an application by the First Defendant to the Court of Appeal for leave to appeal against the Order of the Royal Court of 31st May, 1996, setting aside so much of the Order of the Judicial Greffier of 6th February, 1996, as directed that the Plaintiffs pay to the First Defendant the sum of £250,000 by way of security for costs.

Advocate P. C. Sinel for the Plaintiffs.
Advocate A.R. Binnington for the First Defendant.

JUDGMENT

CRILL, JA: The judgment I am about to give is that of the Court.

On 6th February, 1996, the Judicial Greffier made a number of Orders in this case. He ordered the Plaintiffs (the Respondents) to furnish security for the costs of the Defendants (the first of whom is now the Appellant) to a total of £480,000. The amount fixed for the Appellant was £250,000. The Greffier allowed four months for this to be done; stayed the action until it was and refused to stay his Orders pending appeal. The other two Orders were consequential.

The Plaintiffs appealed to the Royal Court against the Order for security and the Defendants appealed as to the amounts.

On 31st May the Royal Court allowed the Plaintiffs' appeal, dismissed the cross-appeal and revoked the Judicial Greffier's Order. The Court's written Judgment was delivered on 11th June, 1996. The Court also ordered the Defendants to pay the costs of the appeal and the hearing before the Judicial Greffier and refused the Defendants leave to appeal.

The matter now comes before this Court by way of a summons by the First Defendant, Cantrade Private Bank Switzerland (C.I.) Limited, asking for the action to be stayed pending the outcome of of an application to this Court for leave to appeal from the Royal Court's decision of 31st May. It also seeks an extension of time within which to make that application, together with the costs of the instant summons.

At the hearing before the learned Lieutenant Bailiff both parties accepted that the Judicial Greffier had correctly set out the law and that Keary Developments Ltd -v- Tarmac Construction Ltd & Anor [1995] 2 All ER 534-544 could properly be followed. The learned Lieutenant Bailiff in his Judgment analysed the principles underlying that case. Neither of the parties have sought to challenge his assessment of the law. It may be said, therefore, that in the event of an appeal or an application for such, it is unlikely that a mistake as to the law by the Royal Court as a ground of appeal would succeed. A complaint about its application of the law to the facts would of course be something quite different.

It seems to us that the background to this case was set out succinctly in the Judicial Greffier's Judgment although the learned Lieutenant Bailiff elaborated that synopsis and neither of the parties has criticised that part of his Judgment. It is, we think, unnecessary to go further into the details of the case and, accordingly, we set out the précis at the start of the Judicial Greffier's Judgment of 6th February, 1996:

> *"The First Plaintiff acted as a Trustee in relation to investments being made by various investors in a scheme which was based around geared speculation in the foreign exchange market and the Third Plaintiff was their nominee company in whose name various bank accounts representing the invested monies were held. The Second Plaintiff was the company responsible for the running of the investment programme. The First Defendant is the bank in which the monies relating to the investments were held in Jersey and which handled the foreign exchange dealings. The Second Defendant is an English firm of accountants based in Nottingham, one of the partners of which produced certain certificates in relation to the performance of the investment programmes. The allegations against the First Defendant are broadly speaking:-*
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> *(a) that they knew that there were certain safeguards to prevent the loss of more than 10% of an investor's capital and that although they knew that substantial and regular losses were being made they did not warn the Plaintiffs of this;*
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> *(b) that the First Defendant paid a secret commission to Doctor Young, the individual who was making the currency decisions or to one of his companies and this to the prejudice of the Plaintiffs; and*
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> *(c) that the First Defendant had a much closer relationship with Doctor Young and his companies than was declared to the Plaintiffs, including providing him with housing in Jersey, and if this and the matter set out in (b) above had been known by the Plaintiffs then they would not have proceeded in channelling the investments through the First Defendant.*
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> *Broadly speaking the allegation against the Second Defendant is that Mr. Williams, the partner involved, purported to audit the results of the trading and that the Plaintiffs relied upon this auditing to their detriment".*

The Plaintiffs allege breach of contract, negligence, constructive trusts, secret profits and misrepresentation. In brief, Mr. Sinel told us, what happened was a "racket" which he defined as "a series of fraudulent acts".

After considering the case of Porzelack KG -v- Porzelack (UK) Ltd [1971] All ER 1077 and examining the affidavit evidence the Judicial Greffier decided that the Plaintiffs did not have that high degree of probability of success in the sense set out in that case. Porzelack was not mentioned in the Royal Court's Judgment. Nevertheless it may be said that in the round the learned Lieutenant Bailiff agreed with the Judicial Greffier's assessment as to the probability of success although he expressed it somewhat differently. The learned Lieutenant Bailiff said (at the top of p.11 of the Judgment):

> ***"The case involves clear allegations of fraud and in the view of the Court it would be wrong, prior to the evidence having been heard out, to go so far as to find that the Plaintiffs have shown a strong probability of success".***

Both the Judicial Greffier and the Lieutenant Bailiff then dealt with the question of oppression and the stifling of the Plaintiffs' case although the Judicial Greffier did not consider that that position would arise until a sum of two million pounds by way of security had been ordered.

In the end the Royal Court, after carrying out the balancing exercise as set out in Keary, reached the opposite conclusion to that of the Judicial Greffier. In the exercise of its discretion the Royal Court allowed the appeal. In doing so it had regard to three considerations. These were: 1) all the circumstances of the case; 2) the possibility or probability that the Plaintiffs will be deterred from pursuing their claim is not *per se* a sufficient reason for not ordering security; 3) the Court must carry out a balancing exercise.

Before making his Order and allowing the appeal of the Plaintiffs the learned Lieutenant Bailiff cited a passage from Keary which is to be found at p.10 of the Judicial Greffier's Judgment. The excerpt reads:

> ***"The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim".***

The learned Lieutenant Bailiff also referred to another passage in Keary requiring the Court to be satisfied that an order for security would stifle a valid claim.

The learned Lieutenant Bailiff noted that although the claim was brought under a number of headings the principal one was that of fraud. We were told that actions have been brought against Dr. Young in the Royal Court and also against the Finance and Economics Committee. We were not told the allegations against that Committee.

In dealing with the validity of the Plaintiffs' claim the learned Lieutenant Bailiff said that ***"...the claim is in terms a proper one, and one which the Court finds is genuine. The allegations are highly serious and require an answer, and the claim is one which the Plaintiffs should not be stifled from bringing forward".*** He added a paragraph which we think is germane to the present summons. He said this:

> ***"That the case should be enabled to proceed will permit the evidence of all the parties to be heard out and any liabilities properly fixed; and give those whose honesty and reputation is under attack an opportunity to meet, and if innocent, rebut such allegations".***

The criticisms in the main by the Appellant of the learned Lieutenant Bailiff's Judgment centre on his failure to take sufficient note of the possible assets of the investors and his insufficient attention to the inflated claims of the Plaintiffs. We do not think it necessary to go further into the facts than we have done. Furthermore, we think it important to bear in mind that if the matter does go to appeal then that appeal will be about the exercise of a judicial discretion which is indeed the case in the instant application. There is clear authority in this Court on this point. It is the case of Purdie -v- Bailhache & Bailhache (1989) JLR 111. At p.117 the Court said this:

> ***"The order impugned in this court was the exercise of a discretionary power. In Abdel Rahman v. Chase Bank (C.I.) Trust Co. Ltd. this court (Neill, Clyde and Fennell, JJ.A.), following Cutner v. Green, adopted the English courts' approach to the question of appellate review of judicial discretion. The most lucid exposition of the approach is to be found in the judgment of Asquith, L.J. in Bellenden (formerly Satterthwaite) v. Satterthwaite. That learned Lord Justice said ([1948] 1 All E.R. at 345):***
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> > ***'We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might***

reach widely different decisions without either being appealable. It is only when the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere'."

It follows that the Appellants would have to show that the learned Lieutenant Bailiff was plainly wrong. As we are not considering an application for leave to appeal we express no view as to this.

The following account of the progress of the action to date is relevant in considering the present application by the Second Defendant. The action was commenced in July, 1994, and an application for security for costs was due to be heard on 3rd October, 1995. For reasons we need not go into that hearing could not take place; it was re-fixed for 6th November, 1995. At that hearing before the Royal Court Mr. Sinel submitted that that body was not the appropriate tribunal and the matter was referred to the Judicial Greffier who, on 21st November, 1995, set down a time table for the addresses by counsel limiting them to the time for which they could speak. That was challenged by Mr. Sinel and on 20th December, 1995, that appeal was dismissed. The application was eventually heard on 10th January, 1996, with judgment as we have noted on 6th February, 1996.

Each side seems to be taking the utmost advantage of any procedural irregularity that it can and we do not think there is much to choose between them in respect of allegations of delay. Nevertheless the fact remains that from July, 1994, - although the claim first came before the Court on the Friday afternoon, 30th September - until the 3rd October, 1995, giving a favourable date to the Defendants, they were unsecured against costs for something like thirteen months.

Mr. Binnington for the Appellant contended that without an order for security the action would proceed at the First Defendant's risk. We must assume that that risk was appreciated the moment the action was called but no steps were taken for some time, as we have already noted, to apply for security for costs, particularly as the Plaintiffs are each foreign companies incorporated in Switzerland, Liberia and Panama respectively. If the First Defendant was as concerned as has now been submitted to us it was, and is, about continuing in an unsecured position, it seems strange that an early application was not made for security for costs after September, 1994.

As to the inflated claims of the Plaintiffs, Mr. Binnington was right to draw our attention to several of them which would, if successful, have resulted in benefit to the investors and not to the Plaintiffs. Be that as it may and whatever approach one takes

on the question of figures, the claim by any standards is substantial and probably is not less - or claimed to be so - in respect of trading losses directly attributable to Cantrade than somewhere between ten and sixteen million US dollars. As regards the investors' assets it was strange, Mr. Binnington said, that the Plaintiffs would prefer to wait until an appeal - if leave is granted - was actually heard before asking the investors for further funds beyond what some had already contributed and yet pleaded lack of funds as a reason for security not being provided. The minimum figure for investors on the 'F' account was one million dollars and on the general account US$100,000. As regards the lack of funds of the Plaintiffs by their own evidence they had insufficient funds to go beyond the end of discovery and, accordingly, they would not be stifled by an order for security for costs because the case would collapse anyway. The effect of not having security would be to render any appeal nugatory. The investors had not been properly approached; it was inconceivable that rich investors such as they undoubtedly were, having regard to the minimum amount of deposits which we have mentioned earlier, would not wish to fund an action if they believed it had any chance of success.

Mr. Binnington accepted that in an application of this sort the Court was exercising judicial discretion which was unfettered. He cited a Court of Appeal case in this Court of Seale Street Developments -v- Chapman (1992) JLR 243 which we take to be the authority in this jurisdiction. There the Court dealt with the principles governing the power to stay which is conferred on it by Article 15(1) of the Court of Appeal (Civil) (Jersey) Rules 1964 and it added that the Court may determine an appeal for a stay notwithstanding that application had not been first made in the Court below. The English provision dealing with the stay of execution, O.59 r.13(1) of the R.S.C., is in terms not materially different from the Jersey Rule and decisions upon the operation of the English Rule are clearly pertinent to the exercise of discretion under the Law of Jersey as indeed the Court of Appeal decided in In Re Barker (1987-88) JLR 1 when the Court said at p.251:

> *"Our opinion is that once it is shown that if no stay be granted the right of appeal would be likely to be rendered nugatory, and that once a reasonable ground of appeal has been shown to exist, then special (that is to say, exceptional) circumstances have to be advanced to justify a refusal of the stay".*

The Court added:

> *"The discretion of the Court is ex facie unfettered and it may take into consideration any matter which it properly considers material to the exercise of its jurisdiction".*

The Court in Seale Street accepted, although it did not say so in terms, that there was indeed a balancing exercise to be carried out and added that ***"there may in a particular case be other factors, such as the consequences to the parties respectively of the grant or refusal of a stay, which require also to be weighed in the balance".***

The distinction between the Seale Street case and the instant application is that there the appellant had an absolute right of appeal whereas here the applicant is, as we have said, asking the Court to exercise its discretion. In short Mr. Binnington put forward four main considerations as reasons why this Court should allow his application. These were: 1) an application for leave to appeal was being proceeded with expeditiously; 2) if a stay was not ordered then, having regard to the fact that an order had already been made for discovery, which is not going to expire until 18th September, 1996, if an appeal was prosecuted successfully for security the Second Defendant stood at risk to lose £75,000; 3) it was just that the stay be granted; 4) the Plaintiffs had not shown special circumstances as required by the Seale Street case why security should not be ordered.

For the Plaintiffs, Mr. Sinel said that the effect of a stay would be to halt all proceedings. There are eleven parties, including an action against Dr. Young and that action will be heard simultaneously with the instant one. There would be cross-discovery in both actions and a stay at this juncture would cause chaos. The Order of Justice had been adequately pleaded. The First Defendant had asked for a very large number of particulars. The Judicial Greffier declined to make orders in respect of every one some of which he described as "very, very bad". Cantrade had appealed and a relatively small proportion of what they were asking for had been ordered by the Royal Court. Touche Ross had asked for 247 particulars of which 60% were acceded to and ordered by the Royal Court.

Mr. Sinel said there had to be an end in the sense that the cases ought to proceed. Enormous problems had been caused to the Plaintiffs by the outrageous fraud committed on them by *inter alia* the First Defendant. Its origins began in 1987 - 1988 and had taken a toll on the health of the principals. There were 90 investors approximately some of whom have commenced actions in Jersey against the Plaintiffs. Advice had been sought from Swiss counsel before proceedings were launched. Dr. Pascal Maurer had been consulted by Mr. Stott, the beneficial owner of the First Plaintiff (the Third Plaintiff is owned by it), at the end of December, 1994, about the matter as he confirmed in a letter dated 19th May, 1996. It does not appear to this Court that the proceedings were launched precipitously or without due thought about the possible consequences to the First Defendant. Some funds were available and the Plaintiffs were not entirely

impecunious, as Mr. Stott's affidavits indicate. Mr. Sinel conceded that if the Plaintiffs lose there will be no money to cover the First Defendant's costs. As regards the suggestion of the inflated claims it seems to us it is immaterial whether the figures amount to ten or twenty-seven million dollars. At its lowest figure as we have already said the claims against the First Defendant for the trading losses are very substantial in any event.

In Aquila Design (GRP Products) Ltd -v- Cornhill Insurance plc [1988] BCLC 134 CA; Fox LJ referred to the Judgment of Megarry V-C in Pearson -v- Naydler [1977] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 where he said:

> ***"(At the same time), the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company..... As against that, the court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company".***

Mr. Sinel said that the First Defendant will spend something like £656,000 in costs to include discovery. The amount which the First Defendant said it would be out of pocket if it succeeded on an appeal would be £75,000. The amount allowed by the Greffier would be about £29,000 which, he contended, was a very small amount in proportion of the total cost for discovery which had been ordered and which ought to be allowed to go ahead.

Looking at all the circumstances we are of the opinion that the refusal to make an order would not render any successful appeal totally nugatory, nor do we feel that the Plaintiffs, even if they are impecunious which they are manifestly not, although the original "fighting fund" is exhausted and although their means are not great by their own admissions, nevertheless are not seeking to put improper pressure on a prosperous Defendant. We cannot help observing, however, that that Defendant is a subsidiary of a well known established Swiss Bank with large resources and that whatever the outcome of the case the Plaintiffs have suffered very large financial losses. They say these are due, in a large part, to the activities of the First Defendant. We agree with the learned Lieutenant Bailiff, putting it in a slightly different way, that the quicker this matter is brought to trial, the quicker the rights and wrongs of the parties (including the Second Defendant) can be determined. If there is a risk in proceeding, as suggested by Mr. Binnington on behalf of the First Defendant, then we think that risk should lie with the Bank. We would have thought that it would have been anxious to protect its good name and to have the case brought to trial as speedily as

possible. Accordingly we are not prepared to order a stay in the present application which is dismissed with costs.

Authorities.

Keary Developments Ltd -v- Tarmac Construction Ltd & Anor [1995] 3 All ER 534-44.

Wilson -v- Church No. 2 (1878) 12 Ch. D. 454 CA.

Seale Street Developments -v- Chapman (1992) JLR 243 CofA.

Sloan -v- Sloan (1987-88) 651 CofA.

Aquila Design (GRP Products) Ltd -v- Cornhill Insurance plc [1988] BCLC 134 CA.

Purdie -v- Bailhache & Bailhache (1989) JLR 111 CofA.

R.S.C. (1995 Ed'n): O.59, r.13(1).

Porzelack K.G. -v- Porzelack (U.K.) Ltd. [1971] All ER 1077.