ROYAL COURT
(Samedi Division)

6th March, 1997 43.

Before: The Judicial Greffier

In the Matter of the Representation of Mayo Associates S.A. & others

Between:	Mayo Associates S.A.	First Representor
And:	Troy Associates Limited	Second Representor
And:	T.T.S. International S.A.	Third Representor
And:	Robert John Young	First Respondent
And:	Maureen Lambert Young	Second Respondent
And:	Anagram (Bermuda) Limited	Third Respondent

Application by the Respondents to strike out the Representation.

Advocate P.C. Sinel for the Representors.
Advocate D.F. Le Quesne for the Respondents.

JUDGMENT

THE JUDICIAL GREFFIER: This Representation is very closely related to action no. 94/6 between the same parties which relates to an investment scheme based upon foreign currency transactions and in relation to which the Representors are suing not only the Respondents but also, in a related action (no. 94/254) a bank and a firm of accountants.

Initially, in action no. 94/6, the Representors obtained both an Anton Piller Order and Mareva Injunctions and, subsequently, they obtained an Order that the assets of the Respondents actually be handed over into the possession of the Viscount (hereinafter referred to as "the Sequestration Order"). The Respondents applied to lift the Mareva Injunctions and the Sequestration Order and were successful in relation thereto. The Representors appealed that decision to the Court of Appeal which upheld the decision of the Royal Court and the Representors

subsequently applied for special leave to appeal to the Privy Council which was refused.

This Representation really has two separate parts to it. The first part seeks an Order from the Royal Court overturning its previous Order lifting the Mareva Injunctions and the Sequestration Order and this upon the basis of allegedly false and fraudulent statements made by the First Respondent in affidavits in support of the application to lift those Orders. The Representors, therefore, seek the reimposition of the original orders. The second part of the Representation seeks, upon the basis of a material change of circumstances, including the availability of new evidence, which was allegedly not available at the time of the original hearings, the reimposition of the original orders.

I have considered carefully whether these matters can be properly brought before the Royal Court by Representation. In particular, the normal way in which an application for the reimposition of an interlocutory injunction and a Sequestration Order upon the basis of new facts would be made would be by an interlocutory Summons before the Royal Court. However, the application to overturn the previous decision on the basis of fraud and perjury is an unusual application and, although it seems to me that this also could have been dealt with by means of an interlocutory Summons in the original action, I cannot say that it cannot also be dealt with by means of a Representation. If the first part of the matter can be dealt with by means of a Representation then it seems to me that the second part of the matter can be added on to it and, therefore, that the Representation has not been incorrectly commenced from a procedural point of view.

Having said that, there may well be procedural disadvantages to the Representors in bringing the matter in this manner, one of which would appear to be the fact that the Court has allowed the matter to be placed on the pending list.

Although the Respondents were seeking to strike out the whole of the original Representation, the Representors, at the first hearing on the afternoon of 7th February, 1997, sought leave to file an amended Representation and, because I was being asked to strike out the whole Representation, I considered the application for an amendment first so that, if it appeared to me in principle, subject to the striking out application, that this ought to be allowed, I could then go on to consider the striking out of the Representation as amended. I decided in principle that subject to the application to strike out the whole of the Representation as amended, that an amended Representation ought to be allowed.

I heard the advocate for the Respondents first on the afternoon of 7th February, 1997, and I heard the advocate for the Representors in answer and the advocate for the Respondents by way of reply on the afternoon of 13th February, 1997.

The Respondents' arguments in favour of striking out can be summarised as follows:-

(1) Firstly, in relation to the first part of the claim in the Representation, that the Representors have exhausted all their judicial remedies in relation to the restoration of the original Mareva Injunctions and Sequestration Order. Advocate Le Quesne submitted that all the judicial machinery had been used up by the Representors and that their attempt, in the Representation, to re-open the matter was an abuse of process.

(2) Secondly, in relation to the first part of the claim in the Representation, that the original Orders had been lifted by the Court because of the abuse of the process of the Court which had occurred when the Anton Piller Order had been enforced by reason of the placing of a "bug" in the premises of the Respondents. Advocate Le Quesne submitted that even if the affidavits of the First Respondent contained falsehoods, these falsehoods had no effect on the Court which made their decision on the basis set out above.

(3) Thirdly, in relation to the first part of the claim brought in the Representation, that a substantial part of the evidence which was claimed to be new evidence, namely the transcript of a meeting with the First Respondent, was available before the hearing of the Court of Appeal and could have been used therein. Although the Representors are claiming that it could not have been so used because of an implied agreement between the parties, Advocate Le Quesne submitted that this was not credible.

(4) Fourthly, in relation to the second part of the claim being brought in the Representation, that is to say the application for an imposition of new Orders upon the basis of a change in circumstances, Advocate Le Quesne again raised the arguments set out in (2) and (3) above and also claimed that this application had no chance of success.

In addition to this, the issue was raised initially by Advocate Le Quesne on behalf of the Respondents as to whether the decision to lift the original Orders was not *res judicata*, although in his reply he slightly shifted his ground to that set out in (1) above.

The matter before me was a striking out application rather than the determination of the two parts of the Representation.

Advocate Sinel, on behalf of the Representors, claimed that the original affidavits of the First Respondent contained lies, that his clients are able to prove this both by reason of the transcript of the meeting which was held with the First Respondent just before the hearing before the Court of Appeal and by reason of evidence which his clients have subsequently obtained. He submitted that, although the matter of the placing of the bug when the Anton Piller Order was enforced, was a major factor in relation to the decisions of both the Royal Court and the Court of Appeal and the refusal of leave by the Privy Council, the allegedly perjured evidence contained in the First Respondent's affidavits was also a significant factor because if the Courts had known that the First Respondent admitted that he had produced false figures then the interim Mareva Injunctions and Sequestration Order would not have been lifted. He also submitted, in relation to the second part of the claim brought in the Representation, that the perjury of the First Respondent would, in itself, be a significant factor for the Royal Court to take into account.

The following sections from the White Book appear to me to be particularly relevant to the application to strike out because of the great similarity between our Rule 6/13 and the English Order 18, Rule 19. :-

(1) the following part of section 18/19/7 on page 329 of the 1997 White Book:-

> ***"Exercise of powers under this rule - It is only in plain and obvious cases that recourse should be had to the summary process under this rule".***

(2) the following part from section 18/19/15 on page 332 of the 1997 White Book:-

> *"18/19/15*
>
> ***"Abuse of the process of the Court" - Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation".***

(3) the following section from paragraph 18/19/16 on page 333 of the 1997 White Book:-

Advocate Sinel, on behalf of the Representors, claimed that the original affidavits of the First Respondent contained lies, that his clients are able to prove this both by reason of the transcript of the meeting which was held with the First Respondent just before the hearing before the Court of Appeal and by reason of evidence which his clients have subsequently obtained. He submitted that, although the matter of the placing of the bug when the Anton Piller Order was enforced, was a major factor in relation to the decisions of both the Royal Court and the Court of Appeal and the refusal of leave by the Privy Council, the allegedly perjured evidence contained in the First Respondent's affidavits was also a significant factor because if the Courts had known that the First Respondent admitted that he had produced false figures then the interim Mareva Injunctions and Sequestration Order would not have been lifted. He also submitted, in relation to the second part of the claim brought in the Representation, that the perjury of the First Respondent would, in itself, be a significant factor for the Royal Court to take into account.

The following sections from the White Book appear to me to be particularly relevant to the application to strike out because of the great similarity between our Rule 6/13 and the English Order 18, Rule 19. :-

(1) the following part of section 18/19/7 on page 329 of the 1997 White Book:-

"Exercise of powers under this rule - It is only in plain and obvious cases that recourse should be had to the summary process under this rule".

(2) the following part from section 18/19/15 on page 332 of the 1997 White Book:-

"18/19/15

"Abuse of the process of the Court" - Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation".

(3) the following section from paragraph 18/19/16 on page 333 of the 1997 White Book:-

"(1) Re-litigation - The power to strike out a claim as being an abuse of process is not limited to the case where the claim is a sham or not honest or not bona fide, and accordingly, where sample cases had been selected from numerous (over 1550) similar claims for equality of pay against the same employers under the Equal Pay Act 1970, the remaining claims being stayed pending the determination of the sample cases including that of the applicant who had ample opportunity to put forward her claim for selection but did not do so, and the Industrial Tribunal dismissed the sample cases, and the proceedings of the applicant to remove the stay on her claim so as to re-litigate the issues afresh were dismissed and her application was struck out as being an abuse of process (Ashmore v. British Coal Corp. [1990] 2 Q.B. 338; [1990] 2 All E.R. 981, C.A.).

It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd v. Waite [1991] 1 Q.B. 241; [1990] 2 E.R. 990, C.A.). It is an abuse of the process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata (Stephenson v. Garrett [1898] 1 Q.B. 677, C.A. and see Spring Grove Services Ltd v. Deane (1972) 116 S.J. 844).

It is however, not an abuse of the process of the Court for defendants to seek to re-litigate issues of non-disclosure and misrepresentation involving insurance cover decided against them in an earlier action by different plaintiffs, but arising from the same transaction. This is especially so where they intend to cross-examine witnesses whom they had been unable to cross-examine in the first action, because in that action they had called those witnesses on subpoena as their own witnesses to produce documents (Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd (1982) 2 Lloyd's Rep. 132, C.A.).

An action for damages for negligence against solicitors which if successful would impugn the correctness of a final decision of a Court of competent jurisdiction, whether civil or criminal, e.g. on the advice of counsel to plead guilty to a criminal charge, is an abuse of the process of the Court, and will be struck out as frivolous and vexatious (Somasundaram v. M. Julius Melchior & Co. [1988] 1 W.L.R. 1394; [1989] 1 All E.R. 129, C.A.).

It is an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings (Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd [1975] A.C. 581) but the failure of the plaintiff in the first action to join a third person as a defendant in that action under O.15, r.6, is not such an abuse of process and the plaintiff is therefore entitled to bring a second action against that person as a defendant, even though it is contended that the issue in the second action had been adjudicated and determined in the first action (Gleeson v. J. Wippell & Co. Ltd [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54). See also Henderson v. Henderson (1843) 3 Hare 100. This doctrine does not apply where there has been a mere procedural defect and the Court has never gone into the merits, though both parties were before it (see Jelson (Estates) Ltd v. Harvey [1983] 1 W.L.R. 1401; [1984] 1 All E.R. 12, C.A.)."

Although both parties quoted from various cases, I was left with a fair degree of uncertainty as to the law of Jersey in relation to seeking to overturn a Court Order upon the basis that that Court Order had been obtained by fraud. Neither party quoted to me any authorities upon the precise point as to the degree of change of circumstances which would be required for a Court to reimpose interlocutory Orders which it had previously lifted.

Accordingly, I simply could not be satisfied that either part of the Representation would be bound to fail or that the matter of the re-imposition of interlocutory Mareva Injunctions and a Sequestration Order was a matter which could not be looked at again by the Courts in the light of the allegation of perjury on the part of the First Respondent and the allegations, in relation to the second part of the Orders being sought, of a material change of circumstances.

Accordingly, I have dismissed the application for the striking out of the whole Representation in its amended form and, indeed, would have done so in relation to it in its original form.

I will need to be addressed by the parties in relation to the matter of the costs of and incidental to the application to strike out.

Authorities

Royal Court Rules (1992) Rule 6/13.

R.S.C. (1997 Ed'n) O.18 r.19.

Bolt & 25 Ors (t/a Chestertons) -v- Leisure Enterprises (Jersey) Ltd (1985-86) JLR 271.

Lazard Bros. & Co (Jersey) Ltd -v- Bois & Bois, Perrier & Labesse (1987-88) JLR 639-650.

Stephens (née Baureiss) -v- Stephens (1988) JLR 284-294.

Cooper -v- Resch (formerly Cooper) (1987-88) JLR 428-433.

Channel Islands & International Law Trust Co Ltd (in its capacity as Trustee of the Halifax Trust), Gilburn Investments Ltd & West -v- Pike & 5 Ors. (1990) JLR 27-47.

4 Halsbury 16: paras 974-981: pp.858-867.

C. Le Masurier Ltd & Anor -v- Alker & Anor (8th April, 1992) Jersey Unreported CofA.

Nos. 12 & 13 Britannia Place -v- J & G (Property) Ltd & Ors (1989) JLR 34.

L.C. Pallot (Tarmac) Ltd -v- Gechena Ltd (11th July, 1996) Jersey Unreported.