ROYAL COURT
(Samedi Division) 108.
6th June, 1997

Before: The Judicial Greffier

Between	Michael Gordon Marsh	First Plaintiff
And	Monica Gabrielli	Second Plaintiff
And	Troy Associates Limited	Third Plaintiff
And	Robert John Young	Defendant

Application by the Plaintiffs for Summary Judgment.

Advocate P.C.Sinel for the Plaintiffs;
Advocate D.F. Le Quesne for the Defendant.

JUDGMENT

THE JUDICIAL GREFFIER: On 15th April and 14th May, 1997, I heard the parties through their advocates in relation to the Plaintiffs' Summons seeking Summary Judgment against the Defendant.

This action relates partly to an allegation (which I shall hereinafter refer to as "the investment claim") that the Defendant owed US$100,000 to the Third Plaintiff and agreed to hold this on behalf of the First and Second Plaintiffs in order that it might be invested as part of the trading in the currency markets which the Defendant was performing either through companies or personally on behalf of the Plaintiffs and other companies and partly to a claim that the Defendant owed certain commissions to the Third Plaintiff (which I shall hereinafter refer to as "the commission claim"). It is alleged that by late 1993, the original investment of US$100,000 had increased to more than US$240,000. In late 1993, the Defendant provided Advocate Sinel with a cheque for the sum of £200,080.03 drawn on his joint bank account with his wife held with the Bank of Bermuda (Guernsey) Limited, in St. Peter Port, Guernsey in respect of the investment and the commission claims. The cheque did not specify a payee but authority was given to Advocate Sinel to fill in the appropriate payee. This cheque was not met and the Defendant is now saying that any sum which was due to the Plaintiffs was not due by him but by one of his associated companies (which is hereinafter referred to as "Anagram"). The Defendant is also alleging that it is not clear as to which of the Defendants has the benefit of the investment claim.

The principles in relation to Summary Judgment in Jersey, in general follow those in England and the parties quoted to me from various sections of the White Book to which I referred in the

case of Hambros Bank (Jersey) Limited v. Jasper (27th April, 1993) Jersey Unreported and which reads as follows:-

> *"(1) The first two paragraphs of section 14/3-4/4 read as follows:-*
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> *"Defendant's affidavit - The defendant's affidavit must "condescend upon particulars," and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.*
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> *A mere general denial that the defendant is indebted will not suffice unless the grounds on which the defendant relies as showing that he is not indebted are stated. If the affidavit commences with a statement that the defendant is not indebted to the plaintiff in the account claimed, or any part thereof, it should state why the defendant is not so indebted, and state the real nature of the defence relied on."*
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> *(2) The text of the opening paragraphs of section 14/3-4/8 reads as follows:-*
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> *"Leave to defend - unconditional leave - The power to give summary judgment under O.14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.*
>
> *Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.*

O.14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend. Thus in an action on bills of exchange, where the defendant set up the plea that they were given as part of a series of Stock Exchange transactions, and asked for an account, it was held to be a clear defence, and entitled the defendant to unconditional leave to defend. "The summary jurisdiction conferred by this Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion." Summary judgment under this Order should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises; but however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment. And in cases arising out of stock transactions, especially, the Court should be very slow in allowing the plaintiff to take judgment without trial or in making payment into Court a condition of leave to defend.

Where the defence can be described as more than shadowy but less than probable, leave to defend should be given, especially where the events have taken place in a country with totally different mores and laws."

(3) Continuing with a quotation from section 14/3-4/8 further down -

"On the other hand, a complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some other reason there ought to be a trial; and leave to defend ought to be given unless there is clearly no defence in law such as could have been raised on the former demurrer to the plea and no possibility of a real defence on the question of fact. Where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and

disreputable business dealings and questionable conduct, the Court should not make tentative assessments of the respective chances of success of the parties or the relative strengths of their good or bad faith, and should not on such an examination grant the defendant conditional leave to defend, but should give unconditional leave to defend.

In an action by a bank claiming to recover sums due under a guarantee of a company's indebtedness, allegations by the guarantors, who were directors of the company, that the receiver appointed by the bank under a debenture issued by the company was guilty of negligence in realising the company's stock at a gross undervalue because the sale had been held at the wrong time, and had been insufficiently advertised and poorly organised and that the bank had interfered with the conduct of the receivership raised triable issues and the defendants were entitled to unconditional leave to defend."

(4) The fifth paragraph on page 150 of the 1993 White Book of the same section commences as follows:-

"Where there is "a fair probability of a defence" unconditional leave to defend ought to be given."

(5) The penultimate paragraph of section 14/3-4/8 commences as follows:-

Even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given."

(6) Section 14/3-4/9 commences as follows:-

"Some other reason for trial - The former O.14,r.1, provided that the defendant should have leave to defend if he "shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally." These words were replaced in r.3(1) by the words that the defendant should have leave to defend if he satisfied the court "that there ought for some other reason to be a trial" of the claim or part to which the summons for judgment relates. These words,

if anything, are wider in their scope than the former. It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial."

(7) *Section 14/3-4/10 commences as follows:-*

"Question of fact - The following principles are laid down in cases decided under this Order. Leave to defend should be given where the defendant raises any substantial question of fact which ought to be tried; or there is a fair dispute to be tried as to the meaning of the document on which the claim is based; or uncertainty as to the amount actually due; such as alleged deception in the prospectus of the plaintiff company; or non-delivery of all the goods, and excessive charges; or whether there had been misrepresentation by the plaintiff; or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witness on his affidavit; or alleged fraud; or whether the plaintiff has fulfilled his part of the contract; or inferiority of work done; or against a surety where there is a reasonable doubt of his liability; or as to the amount of his liability; or where on the facts sworn to there is a prima facie case on both sides."

(8) *Next section 14/3-4/11 commences as follows:-*

"Question of law - Leave to defend should be given where a difficult question of law is raised; e.g. whether the claim is in respect of a gambling transaction; or depends on foreign law.

Nevertheless, if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused. Thus, e.g. where the words of the statute under which the action was brought clearly made the defendants liable, the court refused to give leave to defend."

The Plaintiffs, firstly submit that it does not matter to which of them the investment claim is due. They allege in their

amended Order of Justice that initially the US$100,000 belonged to the Third Plaintiff but that it was transferred in order to be held by the Defendant on behalf of the First and Second Plaintiffs. They also allege that the additional sum for commission of just over US$50,000 was owed to the Third Plaintiff but they do not, in the amended Order of Justice, allege that this was assigned to the First and Second Plaintiffs. A further confusion arises from the fact that in paragraph 7 of the amended Order of Justice they allege that the cheque which was provided was provided to the First Plaintiff. In his amended Answer, the Defendant pleads that all sums which were due were owed by Anagram to the Third Plaintiff. Advocate Le Quesne, on behalf of the Defendant, submitted that if I were to give Summary Judgment then I would have to be satisfied as to the identity of the creditor in relation to this matter. This must be correct. Although the Plaintiffs could assign the claim to any one or more of them in order to simplify the situation, they have not pleaded that they have done this and I cannot see that it can ever be right for a Court to give Judgment in favour of three Plaintiffs where it is unsure as to precisely which of them has the benefit of the claim. I shall return to this issue later when I review the matters that were placed before me.

Once the hurdle of the identity of the owner of the investment claim has been passed, the Plaintiffs have two alternative lines of claim in relation to this matter. The first line of claim is that the Defendant is the appropriate debtor. The second line of claim is that, even if the Defendant is not the appropriate debtor, there is a valid claim against him by virtue of the issuing of the cheque.

Advocate Sinel brought to my attention a number of matters in support of his clients' contention that the investment claim is due by the Defendant and these were as follows:-

(1) Firstly, by a letter dated 16th October, 1991, the Defendant sets out a proposal that the First Plaintiff invest US$100,000 of his own in a foreign exchange scheme. The suggestion is that the monies be transferred to be held by Box Limited, and that they will be held for the First and Second Plaintiffs jointly. There is a suggestion that the Defendant and his wife will give to each of the First and Second Plaintiffs a letter confirming that the relevant monies are due to the First and Second Plaintiffs jointly. Advocate Sinel submitted that Box Limited was the alter ego of the Defendant and his wife and this was not disputed by Advocate Le Quesne. On the last page of that letter there is a statement that if this route is taken then the Defendant will have the money. Advocate Sinel, therefore, submitted that the monies were to be held by the Defendant and his wife on behalf of the First and Second Plaintiffs.

(2) On 16th June, 1992, there was a letter written to the Second Plaintiff which referred to a quick revaluation of "your US$100,000".

(3) When the cheque was issued it was issued not on the account of Anagram but on a joint account of the Defendant and his wife.

(4) With that cheque there was contained a note addressed to the First Plaintiff on the Defendant's headed paper which refers to the Defendant proposing a payment to the First Plaintiff of US$300,000. That note also refers to a final netting off to include payments due from the Defendant to the First Plaintiff.

(5) Finally, I had before me part of the transcript of interviews conducted by various people including Advocate Sinel with the Defendant during 1995. The transcript includes a note that the Defendant was asked "What has happened to Michael's personal investment?" and that the reply was "I got short of money and I still owe Mike some money."

Against this, Advocate Le Quesne raised a number of other matters which he said worked in favour of the Defendant and which were as follows:-

(1) The important letter of 16th October, 1991, was written on Anagram paper. Advocate Le Quesne also submitted that it was not clear as to whether the investment of US$100,000 had been set up in the way suggested in that letter or in some other way.

(2) The letter of 16th June, 1992, addressed to the Second Plaintiff in relation to the quick revaluation was also written on Anagram paper and was addressed to the Third Plaintiff.

(3) A note of the value of the US$100,000 investment as at 18/8/93 was on Anagram paper and was included in with figures relating to the TTS and TTS-F and other investment schemes. Advocate Le Quesne submitted that this suggested that this investment was being treated in a similar way to the other schemes and that as all the main schemes were being run and monies held by Anagram, this implied that this was also happening to the US$100,000 investment.

(4) In paragraph 3.1 of his affidavit in answer the Defendant confirms that this was the structure in relation to the bulk of the investments and that the Plaintiffs in relation thereto regarded themselves as dealing with Anagram.

(5) In paragraph 3.2 of the Defendant's affidavit he deposes that only Anagram had a mandate from the directors of Box Limited to operate bank accounts held in the name of Box Limited.

(6) In relation to the issue as to who owned the investment claim, Advocate Le Quesne pointed out both that in a letter dated 16th December, 1993, requesting the payment of the relevant monies, the First Plaintiff had claimed to have made the investment and that in an affidavit made in 1995 in support of an application to declare the Defendant en désastre that the First Plaintiff had made the same claim.

The first point which I have to decide is the question as to whether the Plaintiffs have satisfied the test in relation to Summary Judgment both in relation to the question as to the identity of the owner of the two claims and in relation to the question of the identity of the Defendant. In my view, they have failed so to do and there remains considerable doubt in relation to both of these. There remains doubt as to whether the investment claim is owed to the First Plaintiff alone, the First and Second Plaintiffs together or the Third Plaintiff. There is a further complication that the commission claim probably belongs to the Third Plaintiff.

In relation to the two claims themselves, there is also some element of doubt because if both the claims are derived from commissions, then it is clear from pleadings in other related actions that some of these commissions may not be due. It was never satisfactorily established at the hearing as to precisely where the original US$100,000 came from.

There is also, in my view, considerable doubt as to whether any amount due is due by the Defendant or by Anagram. In my view, all parties have at various different times been guilty of great sloppiness in their dealing with these matters. It appears that in correspondence that the various parties have referred to themselves personally and their companies interchangeably and it may well be that the apparent admissions of the Defendant should be understood in this light. I repeat that it is not clear as to whether the initial investment of US$100,000 was set up in the way suggested in the letter dated 16th October, 1991, or in some other way.

Thus, I am unable to give Summary Judgment in favour of the Plaintiffs or any of them upon the basis that the sum claimed is due by the Defendant.

I move on to the second basis of claim, namely that based upon the cheque. The leading case on this in Jersey is that of Burke v. Sogex International Limited (1992) JLR 202. I quote firstly from paragraph (1) of the summary of the decision as follows:-

"A cheque tendered in exchange for goods or services was an unconditional order in writing and should be treated as equivalent to cash. Consequently, in an action on dishonoured cheques, the court could not permit any defence to be raised unless, on an objective view of the pleadings, exceptional circumstances amounting to fraud, invalidity or failure of consideration had been disclosed."

I am not proposing to quote further from that case or from a variety of other English authorities which were placed before me because they do not add to the clear principle set out above. In this case there is no question of fraud leading to the issuing of the cheque. However, I have considered the question of the validity of the cheque. When originally issued the name of the payee was left blank. Unfortunately, no authorities were placed before me on this point but, upon the basis of the terms of the letter which the Defendant wrote when sending the cheque, I am satisfied that he gave authority for an appropriate payee's name to be filled in. In fact, it was the name of the firm of Philip Sinel & Co., which was eventually filled in on the cheque. I further noted that Advocate Le Quesne did not seek to make anything out of this point.

The remaining issue, therefore, is that of total failure of consideration. In my view, if the actual debtor were Anagram then there would be such a total failure of consideration because, in tendering the cheque on the joint account of himself and his wife the Defendant was not gaining any advantage. There is, in my view, no consideration for the issuing of that cheque if the true debtor is Anagram. I have already decided that following the Summary Judgment test there is considerable doubt as to who was the true debtor and, therefore, there must be considerable doubt as to whether there has been a total failure of consideration here. There also remains, in relation to the cheque the same problem in relation to the identity of the true creditor, particularly as the cheque was left blank. There would be total failure of consideration in relation to each of the Plaintiffs other than the true creditor or creditors.

Accordingly, I am also unable to grant Summary Judgment to the Plaintiffs or any of them on the cheque. I am, therefore, dismissing the application and granting unconditional leave to defend to the Defendant.

I shall need to be addressed by both parties in relation to the matter of the costs of and incidental to this application.

Authorities

Royal Court Rules 1992: Rule 7/1.

R.S.C. (1997 Ed'n): O.14.

Hambros Bank (Jersey) Ltd. -v- Jasper (27th April, 1993) Jersey Unreported.

Hambros Bank (Jersey) Ltd -v- Eves & Anor. (14th July, 1993) Jersey Unreported.

Burke -v- Sogex International (1992) JLR 202.