COURT OF APPEAL

19th June, 1997. 116

Before: J.M. Collins, Esq., Q.C., (President)
R.D. Harman, Esq., Q.C., and
R.C. Southwell, Esq., Q.C.

Between:	David William L. Dixon	Plaintiff/Respondent
And:	Jefferson Seal, Ltd (Action 95/89)	Defendant/Appellant
Between:	Jane Margaret Richardson	Plaintiff/Respondent
And:	Jefferson Seal, Ltd (Action 95/87)	Defendant/Appellant
Between:	Reeb Investments Limited	Plaintiff/Respondent
And:	Jefferson Seal, Ltd (Action 95/198)	Defendant/Appellant
Between:	Pamela Dawn Simon	Plaintiff/Respondent
And:	Jefferson Seal, Ltd (Action 95/201)	Defendant/Appellant

Application for leave to appeal by the Defendant/Appellant in each action, from the Order of the Royal Court of 5th June, 1997, declining to grant in full their application for an order that the reports of Rea Brothers (Investment Management) Limited (undated) and Jonathan Morley-Kirk, dated 6th May, 1997, being the Plaintiffs' expert witness in these proceedings, be struck out wholly or in part pursuant to the inherent jurisdiction of the Royal Court on the ground that the reports or parts thereof are prejudicial or embarrassing to a fair trial of this action.
Leave to appeal was refused by the Royal Court on 5th June, 1997.

Between:	David William L. Dixon	Plaintiff/Respondent
And:	Jefferson Seal, Ltd (Action 95/89)	Defendant/Appellant

Appeal by the Defendant/Appellant from the Order of the Royal Court of 5th June, 1997, granting the Plaintiff/Respondent's application for discovery of 10 categories of documents described in the Plaintiff/Respondent's summons of 21st May, 1997.

Advocate M. St. J. O'Connell for D.W.L. Dixon and J.M. Richardson.
Advocate N.M. Santos Costa for Reeb Investments Limited, and P.D. Simon.
Advocate A.D. Hoy for Jefferson Seal, Ltd.

JUDGMENT

THE PRESIDENT: This is the Judgment of the Court. The Appellants, Jefferson Seal Ltd, a firm of stockbrokers, seak leave to appeal in one case and appeal in the other against two decisions of the 5th June, 1997, of the Royal Court, comprising the Deputy Bailiff and two Jurats. By one of those decisions experts' reports - delivered by way of exchange by the Respondents to this appeal, namely the Plaintiffs in the action - were ordered to be edited in certain ways; and by the other specific discovery was ordered to be given by the Appellants in respect of certain documents and classes of documents. Leave to appeal was refused in respect of the first of those decisions but was granted in respect of the second.

The Appellants - we shall call them Appellants although in one case they are Applicants for leave - are stockbrokers carrying on business in Jersey with a substantial customer base. Of those customers no less than twenty-nine have been suing them for negligence and in all such cases the allegations are made with regard to the purchase of bonds issued by the Confederation Life Insurance of Canada. Large sums were invested with that company which became insolvent and the holders of the bonds in each case lost their money. An order was made under which seven of the actions were to be tried together during the four weeks following the 23rd June, 1997, that is to say commencing at the beginning of next week. The witnesses of fact are to be called first both by the the Plaintiffs and the Defendants, and this is to be followed by the calling of the expert evidence adduced on each side. Three trust actions involving similar issues have been ordered to be tried in September and October of this year.

We deal first with the application for leave to appeal in the case of the experts' reports. The application to the Royal Court was in the nature of a striking out application; that is to say an application that in each case the reports should be struck out wholly or in part pursuant to the inherent jurisdiction of the Royal Court on the ground that they or part of them were prejudicial or embarrassing to a fair trial of the action. By their Notice of Appeal the Appellants seek leave to appeal against the limited effect of the Order made by the Royal Court. The

grounds of appeal upon which the striking out of parts of the reports were sought were first that no reference should be made to any Plaintiff other than those seven whose actions are about to commence on the ground that any such reference is inadmissible; and secondly that the reports are said to contain findings of fact which relate to the conduct of the Appellant.

The Royal Court in the exercise of its discretion took what, in our experience, is a more than unusual course. Having held, rightly as we conclude, that the Royal Court Rules do not empower the Court to strike out a part of an expert report as if it were a pleading, the Court was prepared to require that the reports be edited so that while any circumstances relative to the establishment of a pattern or course of conduct might be established, it would be inappropriate for the background of the Plaintiffs - other than the seven in question - to be set out in the reports. There are before this Court two reports which have been edited in accordance with those directions and there being no cross-appeal there is no room for criticism of the approach of the learned Deputy Bailiff in being prepared to undertake such an exercise. For the future we would discourage any practice arising under which the Royal Court or indeed this Court is requested to proceed on a course of detailed editing of an expert report with the risk that it, to a greater or lesser extent, ceases to be the report of the witness. Such a practice should only be considered in plain and obvious cases where substantial injustice would otherwise be caused or in cases where the contents of the report or part of the contents are scandalous or embarrassing. Furthermore, again except in unusual or exceptional cases the application, if it is to be made, should be made at the trial and not before.

Reverting to the instant case it is to be borne in mind that it is the Deputy Bailiff who has the management of these twenty-nine cases and that he is well apprised of their nature and of the pleaded issues which they throw up. The decision under appeal was a discretionary one and the exercise of such a power is one with which this Court is loath to interfere. The circumstances in which this Court is prepared to interfere with the discretion of the lower Court are well established as being limited. They are conveniently to be found in the report of

Rahman -v- Chase Bank (CI) Trust Company Ltd [1984] JJ 127 CofA, a decision of this Court, by reference in particular in that judgment to the Abidin Daver [1984] 1 All ER 470, a decision of the House of Lords and in particular the speech of Lord Brandon.

Having compared the terms of the report of Mr. Scott of Rea Brothers - one of the witnesses whose report is in question - as originally tendered, with that which has been edited we find that the excisions made in the latter document comply adequately with the directions of the Deputy Bailiff. In particular in each case, other than the seven which are to be tried, references to the advice given by Mr. Beadle of the Appellants to the Appellants' other individual clients have been excised and in each case the information given in the report with regard to dealings on behalf of the client has in effect been restricted to a description of the holding, the rating at the time of purchase and the value in money and percentage terms. In our judgment to deprive the Royal Court of such information would be to require the Court to judge the seven cases blindly and without regard to the context in which those particular purchases were made and it is not right that the Royal Court should be blinkered to the extent for which the Appellants would argue. Thus the total amount advised to be invested and in fact invested on behalf of individual clients at any particular time is potentially relevant both generally and in the light of the fact that in answer to interrogatories Mr. Beadle has spoken to his own purchase and disposition of the same class of bonds as those in issue. The Appellants are sensitive to the fact that reference is made to certain cases in which advice was given and purchases made by trustees, the seven cases selected for trial next week not including a trust case; I do not accept that this is in any way prejudicial to the Appellants and furthermore it is to be borne in mind that the Deputy Bailiff and the same Jurats are apprised of the whole proceedings so that there seems to be an air of unreality in requiring the deletion of any reference to purchase on behalf of trustees.

Comparison between the report of Mr. Morley-Kirk and the edited version produces the same picture and again we conclude that the edited version complies with the direction of the Deputy Bailiff. Again there is a reluctance on the part of the Appellants to allow references to the

position of trustees. The references to specific clients in section F of the report have been tailored to deal only with the seven cases to be tried next week.

The Appellants have raised an alternative ground for obtaining leave, namely that the expert witnesses in each case came to conclusions of fact which were conclusions for the Court to reach having heard primary evidence on the matters in dispute. Reference was made to well-established authorities in England disapproving of expert evidence which presumes to reach conclusions of fact. In this case there were detailed letters of instruction sent by the advocates acting for each Plaintiff and the expert witness has in each case expressed his opinion in his report on the basis of the assumptions which those letters supported. To disqualify an expert from approaching the matter on such assumptions would provide an Alice in Wonderland situation in which the expert would be required to express a view as to the standard of care exercised in the giving of advice while remaining blind as to what that advice was alleged to be. As we have already mentioned, the Royal Court has ordered that the primary evidence of fact be called first; it will be cross-examined to; and to such extent as there is a successful challenge to the factual evidence led on behalf of the Plaintiffs the expert evidence may be deprived of some or all of its value in a particular case. However, all those matters are matters for the trial and not for interlocutory determination.

Accordingly the application for leave to appeal is refused in respect of the judgment of the Deputy Bailiff on the application to strike out the whole or part of the experts' reports.

We now turn to the appeal against the Order of the Royal Court whereunder specific discovery was ordered in the action by David William Dixon, one of the Plaintiffs in the action to be heard on Monday, in respect of certain documents and classes of documents to be listed by the Appellants and verified by affidavit. Again this was a matter for the discretion of the Royal Court and again this Court would be loath to interfere with that discretion both having regard to the statement of general principle referred to above and to the fact that the Deputy Bailiff and Jurats are seized of the whole of this litigation and have

been for some time, so that this Court with its limited contact with such litigation can obtain only a relatively superficial view compared with that enjoyed by the Royal Court.

The first ground of appeal is that the matter was *res judicata* or *chose jugée* in that such application had already been refused by the Judicial Greffier on 21st March, 1996. This is a ground which can be shortly dealt with; it is axiomatic that it is only in matters where there is the necessary element of finality that the principle relied on, either under its Jersey name or as named in England, can apply. The interlocutory process has to remain sufficiently flexible to allow for changes in circumstances or indeed in the perception which the parties or the Court have of the cause under consideration. Thus, for example, there may be differences in perception as to the trial or ambit of the trial of a preliminary issue in a particular case or indeed as to the issues raised on the pleadings as a case develops. The Royal Court would be severely hampered in the proper administration of justice if it were otherwise. In this case the affidavit of Mr. Morley-Kirk points to the nature of documents disclosed comparatively recently which point to the existence of other documents, and to the scale of rates of commission charged to the clients. Cases in which there is a bare repetition of an application in the same form for the sake of having a "second bite of the cherry" can of course be dealt with in the appropriate case by the dismissal of the application and by an order for costs. It might indeed be considered to be vexatious or frivolous if it were a mere re-arguing of the same matter. However, this was not a re-arguing of the same matter. The application made to the Deputy Bailiff was of a far narrower ambit than that made before the Judicial Greffier, and indeed was supported by the affidavit of Mr. Morley-Kirk of 28th May, 1997, sworn, as we say, after the decision of the Judicial Greffier.

The classes of documents, the subject of the order, were documents relevant to Mr. Dixon's purchase of the bonds (we refer here to items 1 to 5 in the list set out at the conclusion of the Deputy Bailiff's judgment), documents relevant to the purchase of bonds by the other six Plaintiffs (that is those set out as items 7 to 10 in the same list) and documents prepared by the Applicant when reviewing business practices

after the collapse of Confederation Life Assurance of Canada (item 6 in the same list). These are in our view plainly documents which relate to matters in question in the action which require investigation. These documents are at least potentially relevant to the issues for the reasons set out in Mr. Morley-Kirk's affidavit. They satisfy in our judgment the test in Compagnie Financière du Pacifique -v- Peruvian Guano [1882] 11 QB 55, the terms of which are well-known to everyone in this Court. Thus it is an over-simplification to argue, as did Mr. Hoy in his gallant efforts on behalf of his clients, that having been part of that wider class which had been rejected as irrelevant by the Judicial Greffier the Deputy Bailiff was in some way to be inhibited from forming his own view when focused on what appear to have been plain and obvious candidates for discovery.

It was further argued that the application was made very late in the day and that it was unjust that an Order should come so close to trial. This was rejected by the Deputy Bailiff and we can see no reason to depart from his decision. We would only add that the documents in respect of which the specific discovery is sought and in respect of which the Order was made on this occasion would appear on the face of it to have been plainly discoverable from the start.

Having regard to all those considerations we dismissed this appeal at an earlier stage today. So far as the experts' reports are concerned, no further order is required by us save in relation to any application, for example, as to costs.

As regards the learned Deputy Bailiff's Order for specific discovery we confirm what we ordered earlier today: a list of documents accompanied by a draft affidavit is to be served by the Appellant/Defendants by close of business today, 19th June, 1997. The sworn affidavit is to be served tomorrow and an inspection shall take place not later than 9.00 a.m. tomorrow, 20th June 1997. We also, with the consent of the parties, make a slight alteration to the wording of item 6 of those items set out on page 5 of the Royal Court's Judgment of the 5th June 1997 by substituting the words "*made after*" for the word "*following*" and inserting the word "*any*" in place of the word "*the*" immediately preceding the word "*review*"

[*The Court heard submissions on costs*]

Judgment on Costs.

THE PRESIDENT: Applications have been made for an Order for indemnity costs by the advocates representing the Respondents to this appeal.

It is well established that indemnity costs should only be granted in exceptional cases and we bear that in mind. Neither the appeal nor the application for leave to appeal had any real merit for the reasons which are set out in the judgment which we have just given and we observe that in neither case were the advocates for the Respondents called upon.

As to the history with regard to discovery it is not appropriate, having regard to the fact that there are one or more trials ahead, to say more than that it is itself, in our judgment, sufficient to justify the Order which we make. As to the experts reports the Applicants in that case had already succeeded to an extent which, in our view, should have satisfied any reasonable Defendant in their position. In those circumstances we have no hesitation in the case of both appeals to award indemnity costs in this Court.

Authorities

Stanton Ltd -v- Louis & Ors. (5th October, 1992) Jersey Unreported.

Midland Bank Trust Co Ltd -v- Hett, Stubbs & Kemp [1978] 3 All ER 571.

Jackson & Powell on Professional Negligence (4th Ed'n): 1-175 to 1-180: pp.101-2.

Rahman -v- Chase Bank (CI) Trust Co Ltd [1984] JJ 127 CofA.

The Abidin Daver (1984) 1 All ER 470. HL

Matthews & Malek on Discovery: pp.126-130, 138-143.

Compagnie Financière du Pacifique -v- Peruvian Guano [1982] 11QB 55