

COURT OF APPEAL

130.

11th July, 1997.

Before: Sir David Calcutt, Esq., Q.C., (President)  
 R.D. Harman, Esq., Q.C., and  
 R.C. Southwell, Esq., Q.C.

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Between:	Pacific Investments Limited	Plaintiff
And:	Robert Christensen	First Defendant
And:	Alison Mary Holland	Second Defendant
And:	Michael Allardice	Third Defendant
And:	Graeme Elliott	Fourth Defendant
And:	Firmandale Investments Limited	Fifth Defendant
And:	James Hardie Industries Limited	Sixth Defendant
And:	James Hardie Finance Limited	Seventh Defendant
And:	Govett American Endeavour Fund Limited	Eighth Defendant
And:	Ian David Moore	Representor

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Appeal by the First, Second, Third, and Fourth Defendant/Appellants against:

- (1) the Order of the Royal Court of 30th August, 1996 (a) granting the application of the Plaintiff for leave to cross-examine the First Defendant on his Affidavits; and (b) ordering the said Defendant/Appellants to pay the Plaintiff's taxed costs of and incidental to the said Application; and
- (2) the Order of the Royal Court of 3rd September, 1996, allowing the Representor to remove figures from the copy documents disclosed pursuant to a *subpoena duces tecum*.

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Advocate A.J. Olsen for the Plaintiff/Respondent.  
 Advocate W.J. Bailhache for the First, Second,  
 Third, Fourth Defendant/Appellants.

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JUDGMENT

THE PRESIDENT: These interlocutory appeals arise in the course of an action which is proceeding in the Royal Court, and which was initiated by an Order of Justice served on various days in May and June 1995. The litigation has already been described as complex and as disclosing a course of international investment, company manipulation and resourceful accounting of labyrinthine complexity. This action is one of several actions arising out of the same underlying facts. In February and March 1995, an action and a cross-action were initiated in the United States of America. In October 1995, a cross-action was initiated in Jersey. This last action has been described to us as "the main action", and this Court has been told that this action would not be tried before 1999.

The background to the litigation, up until the beginning of 1995, was summarised on an earlier occasion before this Court (24th November 1995) in this way. It is alleged that a relationship developed between the Hardie Group of Companies (which included the Sixth and Seventh Defendants) and Govett Co. Ltd., a company founded by a Mr. Trueger, which control Berkeley Govett (International) Ltd. ("BGIL") and Berkeley Capital Corporation Inc. ("BICC"). Out of this relationship it is alleged that there developed an interest in a closed end investment company called TR Investment Trust plc ("TRT") in which the Hardie Group are alleged to have taken an interest through the vehicle of Firmandale Investments Ltd. ("Firmandale") (the Fifth Defendant). It is alleged that Firmandale was in effect the subsidiary of the Hardie Group, via intermediate arrangements. Substantial funds were raised by Firmandale for the acquisition of 14.9% of the TRT shares, and Govett Co. Ltd. were to be and became appointed as financial advisers, without participation in the equity at that stage. Approximately US\$160m were borrowed to enable Firmandale to acquire these shares against a mortgage and a guarantee from James Hardie Finance Ltd, the Seventh Defendant.

The shares in TRT are alleged to have slumped on the fall of the Stock Exchange in October 1987. Litigation followed resulting in a re-organisation of TRT, which was put into voluntary liquidation. The surplus assets were divided between the two new Trusts, and Govett American Endeavour Fund Ltd. (now known as American Endeavour Fund Ltd) ("the Fund"), the Eighth Defendant, in which Firmandale had a 74.89% holding, KBLP VII Incorporated 4.96%, and others 20.15%.

The Fund was to be dissolved in September 1996, but it appears that a possible extension was contemplated and provided for as an option open to the shareholders. It is alleged that the formation of the Fund was stage-managed by Firmandale and, in particular, by the Second Defendant. It is further alleged that Firmandale and the Sixth and Seventh Defendants played an integral rôle in formulating the investment strategy of the Fund, which was to be "high risk". BGIL was appointed manager and BICC as investment consultant.

By the Order of Justice, the First to Fourth Defendants are alleged to have used their powers as directors of the Fund in an improper manner in their removal of BGIL as manager, the procurement of the retirement of Mr. Trueger as a director, and in commencing the proceedings in the United States of America which brought about the cross-action, as well as "taking control of the board of the Fund". It is further alleged that by doing so they interfered with a potentially valuable merger. In doing so it is said that they acted on the direction or with the knowledge and/or approval of Firmandale and the Sixth and Seventh Defendants. In so acting, they are alleged to have conducted the affairs of the Fund in a manner prejudicial to the interest of other members, including the Plaintiff.

The initiation of proceedings in Jersey was followed by a number of interlocutory applications. On 21st July 1995, the First, Second, Third, Fourth and Fifth Defendants applied to the Court to strike out the Plaintiff's Order of Justice. In express support of that application Mr. Robert Christensen, the First Defendant, swore and filed several affidavits.

On 22nd April 1996, the Royal Court ordered, by consent, that, at the hearing of the summons to strike out, a Mr. Ian David Moore, the deponent of affidavit evidence sworn on behalf of the Plaintiff, should attend the hearing for cross-examination. It is thus contemplated that there will be oral evidence at the hearing of the summons.

On 18th July 1996, the Plaintiff applied to the Court for an order that, at the hearing of the summons to strike out, Mr. Christensen be ordered to appear and to be sworn as a witness and to be examined and cross-examined on his affidavits. This application was opposed by the Defendants.

On 30th August 1996, the Lieutenant Bailiff granted the Plaintiff's application for leave to cross-examine Mr. Christensen on his affidavits. Recognising that both parties agreed that the Court was exercising its discretion, and that that discretion should be exercised within the guidelines set out in Arya Holdings -v- Minorities Finance Ltd (31st October, 1991) Jersey Unreported; [1991] JLR N-2, the Lieutenant Bailiff observed that the discretion was a wide one, and that although in practice cross-examination did not often take place on an interlocutory application, it had done so in Arya Holdings. The Lieutenant Bailiff expressed the view that the application must be genuine - or "*bona fide*" - and drew attention to the observations of Cross L.J. in Comet Products UK Ltd -v- Hawkex Plastics Ltd (1971) 2 Q.B. 67, at p.77, where he had said:

*"It is, I think, only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit".*

Having summarised the submissions of counsel, the Lieutenant Bailiff took the view that there were documents before the Court upon which it appeared to him to be proper for the Plaintiff to cross-examine Mr. Christensen, and that the application was *bona fide*. He expressed the view that, even without taking into account the statement of Cross L.J., the Court found the application to be a proper one, and accordingly made the Order as sought in the summons. Leave to appeal

was granted, and that appeal forms the subject-matter of the first appeal before this Court today.

5 The decision of the English Court of Appeal in Comet Products UK Ltd (supra) provides support for the broad proposition that only in exceptional cases should an application to cross-examine a deponent on his affidavit be refused. In Comet Products UK Ltd, the Court declined to permit cross-examination, but that was because of the nature of those particular proceedings, namely proceedings for contempt, and the need to avoid the risk of self-incrimination. Nevertheless, Lord Denning M.R. 10 said this at p.74:

15 "*Clarke -v- Law (1855) 2 K & J 28 and In re Quartz Hill etc. Co, Ex parte Young (1882) 21 Ch. D. 642 ... show that in ordinary civil proceedings in Chancery, if an affidavit is filed and used before the court, the defendant, when he is threatened with cross-examination, cannot get out of it by saying that he will withdraw his affidavit. If he has filed an affidavit, and in addition has gone on to use it in the court, then he is liable to be cross-examined upon it if the court thinks it right so to order. I would not say that the mere filing is sufficient, but I do say that when it is not only filed but used, the defendant does expose himself to a liability to be cross-examined if the judge so rules*".

25 In his judgment, at p.77, Cross L.J. said this:

30 "*I have no doubt that the judge had jurisdiction to order cross-examination and that the only question for determination on this appeal is whether he was right to order it. It is, I think, only in a very exceptional case that the judge ought to refuse an application to cross-examine a deponent on his affidavit*".

35 If, on an application by a defendant to strike out an Order of Justice, the defendant introduces and seeks to rely on affidavit evidence then, *prima facie*, it must be open to a plaintiff to be permitted to cross-examine the deponent, if the Court sees fit so to order.

40 For the Appellant it was contended that the Plaintiff should not be permitted to cross-examine Mr. Christensen on his affidavits. It was submitted that, having regard to the specified and limited bases on which the strike-out summons would be presented, there was no issue of fact which would be resolved by the cross-examination of Mr. Christensen, and that there was accordingly no justification for allowing such cross-examination. Further, it was contended that if the Plaintiffs were afforded the opportunity to cross-examine, the occasion would be misused, to the detriment of the Defendants. It was yet 45 further contended that preparation for the hearing of the summons to strike out would put a significant additional burden on the Plaintiffs, and so hamper them in their preparation for trial in the main action.

55 For the Plaintiff it was contended that the Plaintiff was not to be deprived of its right to cross-examine Mr. Christensen simply on the Appellant's asserted analysis of the issues which would arise at the hearing of the strike-out summons. Mr. Christensen, having sworn and

filed affidavit evidence in the proceedings, must expect to be made available for cross-examination, including cross-examination as to credibility. It was further contended that the decision of the Lieutenant Bailiff was not merely one taken in the exercise of his discretion, but also one taken in the management of the proceedings; and our attention was drawn in particular to the decision of the Court of Appeal in England in Thermawear -v- Linton and Another (17th October 1995) Unreported Judgment of the Court of Appeal of England.

For my part, I am not prepared to accept that the Plaintiffs should be denied the opportunity to cross-examine Mr. Christensen. It is not so much that, since Mr. Moore will be available for cross-examination, Mr. Christensen should similarly be made available, but rather that to deprive the Plaintiffs even of the opportunity to cross-examine Mr. Christensen on his various affidavits seems to me to take too restricted a view of the function of cross-examination and it would be unfair to the Plaintiff. Mr. Christensen is a deponent on behalf of the Defendants in the strike-out proceedings, and it is not possible to know precisely what matters the Plaintiff may wish to raise with him in cross-examination. The Court which hears the summons to strike out will be well aware that the issue to be determined is whether or not a sufficient case has been made for striking out, and that the scope of any cross-examination of Mr. Christensen must be controlled with this in mind.

In my view the Lieutenant Bailiff reached the correct conclusion, and I would dismiss this appeal on that ground. But the matter was one for the exercise of the discretion of the Lieutenant Bailiff and, for my part, I would not have been willing to have disturbed his exercise of that discretion. Accordingly, in my judgment, the first interlocutory appeal fails.

The second interlocutory appeal relates to the redaction of money figures contained in certain documents disclosed by Mr. Ian David Moore, as a director of Pacific Investments Ltd, the Plaintiff in this action, in response to a subpoena duces tecum, served on him by the First, Second, Third and Fourth Defendants in the course of this action. It is contended, on Mr. Moore's behalf, that Mr. Moore should not be required to disclose the figures in question. That contention is disputed by the First, Second, Third and Fourth Defendants.

This particular interlocutory matter came before the Royal Court at the beginning of September 1996. The Royal Court was then required to rule on a number of matters with which this Court is not today concerned. The matter with which this Court is presently concerned were considered by the Lieutenant Bailiff in the course of the judgment which he gave on 3rd September 1996. There he recorded that Mr. Journeaux, for Mr. Moore, had contended that the redacted material was irrelevant, that its disclosure would be oppressive, and that the Defendants should not be permitted to pry into the structure of the legal advice or to go beyond what was already admitted and known. He also recorded that Mr. Bailhache for the four Defendants had contended that the figures might well be relevant to the issues to be determined. The Lieutenant Bailiff took the view that Mr. Journeaux's contentions were correct, and that accordingly the figures were not subject to disclosure. Leave to appeal was granted, and this forms the subject-matter of the second interlocutory appeal before this Court today.

At the hearing before this Court, it was contended on behalf of the Appellants, that, having regard to the various legal entities involved, neither legal professional nor litigation privilege arose, and that the redacted figures were relevant to the issues arising in the strike-out proceedings. It was contended for the Respondents that the decision of the Royal Court was made in the exercise of the Court's discretion, and that the redacted information was such that, if not entitled to the protection of legal professional or litigation privilege, then it was so closely connected with and proximate to such information that it would be wrong for Mr. Moore to be compelled to disclose it.

In my view the Lieutenant Bailiff came to a correct conclusion in this matter. It does not appear to me that the Lieutenant Bailiff approached this matter on any erroneous principle. Further, the decision involved the exercise of the Lieutenant Bailiff's discretion; and, as this Court has said, the circumstances in which the Court of Appeal will interfere with the exercise of that discretion are limited: see the decision of this Court in the instant case on 24th November 1995, citing Rahman -v- Chase Bank (1984) JJ 127 CofA at p.133 and following. For my part I can see no grounds for interfering with the Lieutenant Bailiff's exercise of his discretion.

Accordingly, for my part, I would also dismiss this second interlocutory appeal.

Authorities.

(on appeal against Royal Court Order of 30th August, 1996, granting Plaintiff leave to cross-examine the First Defendant on his affidavits).

Phipson on Evidence (14th Ed'n) pp.547-551.

Thermawear Ltd -v- Linton (17th October, 1995) Unreported Judgment of Court of Appeal of England.

Grupo Torras & Another -v- Al Sabah & Others (No. 2) (17th April, 1997) T.L.R.

Pacific Investments -v- Christensen & Others (25th October, 1996) Jersey Unreported.

Bamford -v- Bamford [1970] Ch. 204 C.A.

Abdul Rahman -v- Chase Bank (CI) Trust Co. Ltd. (1984) J.L.R. 127 CofA.

Smith -v- Croft [1988] Ch. 114.

Millard -v- Baddeley & Others [1884] Bitt. Rep. in Ch. 125.

Re: Smith and Fawcett [1942] Ch. 304.

Re: S.B.A. Properties Ltd [1967] 1 W.L.R. 799.

Comet Products UK Ltd. -v- Hawkex Plastics Ltd. [1971] 2 Q.B. 67.

Sullivan -v- Henderson [1973] 1 W.L.R. 333.

Prudential Assurance Co. Ltd. -v- Newman Industries Ltd. & Others (No. 2) [1981] Ch. 257.

Prudential Assurance Co. Ltd. -v- Newman Industries Ltd. [1982] 1 Ch. 204.

Barrett -v- Duckett & Others [1993] B.C.C. 778.

Arya Holdings Ltd. -v- The Minorities Finance Ltd. (31st October, 1991) Jersey Unreported.

R.S.C. (1997 Ed'n): O.14/3-4/7: pp.155-8.

Forrest -v- The Manchester Sheffield and Lincolnshire Railway Co. [1861] 4 De G. F. & J. 126.

Wenlock -v- Moloney [1965] 1 W.L.R. 1238.

(on appeal against Royal Court Order of 3rd September, 1996, allowing the Plaintiff to remove figures from copy documents produced pursuant to a *subpoena duces tecum*).

Gotha City -v- Sothebys & Another (19th June, 1997) "The Times".