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ROYAL COURT
(Samedi Division) 97.

25th May, 1995

Before: The Deputy Bailiff and
Jurats Orchard and de Veulle

Between	(1) David Eves (2) Helga Maria Eves (née Buchel) (3) Richard Charles Eves	Plaintiffs
And	St. Brelade's Bay Hotel Limited	Defendant

Advocate R. J. Michel for the Defendant.
The Plaintiffs, with the exception of
Mr. Richard Charles Eves, appeared personally.

JUDGMENT

THE DEPUTY BAILIFF: This is an application by St. Brelade's Bay Hotel Limited ("St. Brelade's Bay") under Rule 6/13(1) of the Royal Court Rules, 1992, as amended, to strike out the whole of an Order of Justice on one or other of the five grounds available under the Rule. The application is made against the Plaintiffs to this action, Mr. David Eves, Mrs. Helga Maria Eves (née Buchel), and their son Richard Charles Eves. The matter came before this Court previously, but we felt that, because of the numerous legal authorities contained within Mr. Michel's bundle, the Eves family (if we may call them thus) should properly be represented by a lawyer. Mr. Eves attempted to obtain legal aid, but apparently this has been refused, and on the 23rd May, the Court received a letter from Mr. Manning, the solicitor, to say that Mr. Richard Eves wished his father to represent him in Court and that he did not wish to be further advised professionally.

Mr. Richard Eves was not present in Court today. His father told us the circumstances and we allowed Mr. Eves to argue this matter both on his own behalf and on behalf of his wife. This is probably not permitted in law, but Advocate Michel declined to make any point of it. We allowed the matter to proceed. We examined in detail each and every word of the first 22 paragraphs

of what we shall now call "Mr. Eves' Order of Justice". The claim against St. Brelade's Bay is set out in paragraph 22 as follows:-

> *"That by reason of the matters aforesaid the first, second and third plaintiffs have suffered substantial losses, costs and expenses, loss of profits, income, travel concessions, pride and dignity and respect in the society. The first and second plaintiffs have been deprived of a lifetime's work in the travel and tourism industry. Their entire futures have been jeopardised both professionally and personally, their home has been put under threat and the third plaintiff has been deprived of the right to take over the family business for which he was being trained. The first, second, and third plaintiffs have suffered mental illness, stress, inconvenience, discomfort and annihilation and have thereby suffered loss and damage."*

What are the matters which give rise to these extraordinary claims? They are set out in the Order of Justice and the essence of the Plaintiffs' case is that, by reason of the fact that on 11th February, 1994, the goods of Blue Horizon Holidays Limited were declared *en désastre* they have suffered damages which, as set out in the Order of Justice, would lead to a total claim of £808,880.88 by way of special damages and also general damages. The facts are reasonably clear to us and the history of the litigation leading to the *dégrèvement* of the Eves' family property has been well rehearsed before this Court, the Court of Appeal and the Privy Council. Simply by way of background, following the declaration of the *désastre* on 11th February, 1994, Blue Horizon (which is the *alter ego* of Mr. and Mrs. Eves) either directly or indirectly made the following applications to the Court:

(i) On the 14th February 1994, an application pursuant to Article 7 of the Bankruptcy (Désastre) (Jersey) Law 1990 for an Order recalling the declaration of the *désastre*. For the reason given by the then Deputy Bailiff, the application was dismissed.

(ii) On the 18th February 1994, a further application pursuant to Article 7 of the Bankruptcy (Désastre) (Jersey) Law 1990 for an Order recalling the declaration of the *désastre*. For the reason given by the then Deputy Bailiff, the application was dismissed.

(iii) On the 4th March 1994, a further application pursuant to Article 7 of the Bankruptcy (Désastre) (Jersey) Law 1990 for an Order recalling the declaration of the *désastre*. For

the reason given by the then Deputy Bailiff, the application was dismissed.

(iv) On the 11th March 1994, a further application pursuant to Article 7 of the Bankruptcy (Désastre) (Jersey) Law 1990 for an Order recalling the declaration of the *désastre*. For the reason given by the then Deputy Bailiff, the application was dismissed.

(v) On the 6th May 1994, a further application pursuant to Article 7 of the Bankruptcy (Désastre) (Jersey) Law 1990 for an Order recalling the declaration of the *désastre*. For the reason given by the then Deputy Bailiff, the application was dismissed.

(vi) On the 18th May 1994, Blue Horizon, having filed and served a Notice of Appeal against the decision of the Royal Court of the 11th February 1994, to grant the declaration of *désastre*, applied to the Royal Court, pursuant to Rule 15 of the Court of Appeal (Civil)(Jersey) Rules, 1964, for a stay of the *désastre* proceedings pending the determination of the Appeal. The Royal Court decided that it had jurisdiction to consider the matter and on the 19th May, held that "***to grant a stay in the form required would be no more than raising the désastre on a basis quite different from that anticipated in the Law***". The Court went on to say "***we can see that the consequences of the Order, if we were to grant it, in the form required by Mr. Eves, would be to raise the désastre on no better grounds than those already refused by this Court on four occasions.***"

(vii) On 28th September, 1994, the Court of Appeal on the application of Blue Horizon, adjourned Blue Horizon's appeal against the Order of the Royal Court of 11th February 1994 and the Judgment of the Royal Court of 14th February and 18th February and 4th March. In so doing the Court said:-

"***The problem, so far as we are concerned, is that, having read the papers carefully, we take the view that there must be the gravest doubts as to whether, in this particular matter, a declaration, having been made by the Inferior Court and applications having been made to the***

Inferior Court to recall that declaration, this Court of Appeal has any jurisdiction at all. We have made that perfectly plain to Mr. Eves."

The main difficulty that Mr. and Mrs. Eves must overcome is the problem of how they can bring this action at all. Although not specifically pleaded, Mr. Eves (who conducted with great courtesy his argument before us) told us that the plaintiffs appeared "*as shareholders and directors*" of Blue Horizon. The Rule in Foss v. Harbottle (1843) 2 Hare 461, paragraph 6.99 - stating that in an action to redress a wrong done to a company or to recover money or damages alleged to be due to it, the company is the only proper Plaintiff - is not only so well known to this Court that it barely needs repeating, but surprisingly, is very well known to Mr. and Mrs. Eves. On 4th October, 1993, in their action against the Tourism Committee, Eves -v- Tourism Committee (4th October, 1993) Jersey Unreported, certain passages in an Order of Justice were struck out. Mr. and Mrs. Eves were represented by Counsel in that action. At page 2 of its judgment the Court said this:-

> "*Furthermore, Mr. Le Cocq has told us that although the Order of Justice was obtained personally by the two plaintiffs and therefore without the benefit of legal advice in February, 1993, in June of this year, following an application for an extension of time on behalf of the defendants within which to file pleadings, he and either Mr. Eves or Mrs. Eves appeared before the Judicial Greffier. Afterwards Mr. Le Cocq explained either to Mr. Eves or to Mrs. Eves, or to both - it is not clear to us exactly who was present - the implications of the Rule in Foss -v- Harbottle. The plaintiffs therefore have had from June until now to seek legal advice and the fact that they obtained the advice of Mrs. Sharpe only two weeks ago is not something that we find sufficiently convincing to allow us to set aside, or at least to postpone, the clear effect of Foss -v- Harbottle.*"

Mr. Eves conceded that he was aware of the Rule and further conceded that his action could not lie within the well-known exceptions to the Rule in Foss v. Harbottle. The exceptions relate only to cases where the persons against whom relief is sought hold and control the majority of the shares and will not permit an action to be brought in the company's name and so (a) the act complained of is *ultra vires* the company or illegal; (b) the act complained of constitutes a fraud against the minority of the shares and the wrongdoers control the company; (c) there is an irregularity in respect of which a qualified majority of votes is

required; or (d) the act complained of infringes the personal rights of an individual shareholder. None of these exceptions apply in the instant case, but Mr. Eves argued strongly that he was bringing a derivative action and he relied on certain cases set out in Advocate Michel's copious bundle. We have examined these cases anxiously on Mr. Eves' behalf.

It must be recalled that the Court of Appeal in Prudential Assurance (No. 2) v. Newman Industries (1982) Ch 204, reiterated that where fraud was practised on a company, it was the company that, *prima facie*, should bring the action and it was only in circumstances where the board of the company was under the control of fraudsters that a derivative action should be brought. It seems to us essential, if Mr. Eves is to withstand the attack made upon his pleading, that he establish a *prima facie* case that the company is entitled to the relief claimed and that he and Mrs. Eves have a right to bring the action on behalf of the company. Before we proceed to examine the law under which the declaration of *désastre* was made it is essential for us to understand the wrong that Mr. and Mrs. Eves allege (even if they were able to bring the action in the way that they have), that they suffered. Mr. Eves alleges that the defendant's managing director, Mr. Robert Colley, applied for a declaration of *désastre* as a purely "malicious prosecution", and without any right or justification. Mr. Eves' complaint is that the *désastre* was applied for *ex parte*, and that when he realised what had happened to his company he tried to pay off the debt which he acknowledges was due, but his overtures were refused. We accepted two short affidavits from Mr. Eves and from Mr. James Barker, although evidence on an application such as this is always unusual and normally not acceptable but we have to note that in his short affidavit, Mr. Barker said this:

> *"Of course I was more than disappointed that Mr. Colley was not prepared to help as I was prepared to put up £1,700 to help the Eves family. Mr. Colley was most courteous on the 'phone and I thank him for the help".*

That offer by Mr. Barker surprises us when Mr. Eves, in his affidavit, told us that he had gone to the office of Crills once the declaration had been made "to offer the £1,712.34 to Advocate Gollop". It was an offer by cheque. It was properly refused. We are dealing with the facts, although we are well aware that our duty on an application such as this is not to exercise a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action - (Wenlock v. Maloney (1965) 2 All ER 871, but when we do examine the facts, it seems to us that the cause of action is not only obviously bad, it is incontestably bad. We say this very

much aware that in Dyson v. Att. Gen. (1911) 1KB 410, the Court said that unless there were such exceptional circumstances as we have stated, the Court would not permit a plaintiff to be "driven from the judgment seat".

Let us recall that in Arya Holdings v. Minories Finance (31st March, 1992) Jersey Judgments the Court said this:

> *"The principles which the Royal Court follows on these applications is well known and we do not propose to rehearse them here. It will suffice to say that we were referred, inter alia, to Rule 6/13 of the Royal Court Rules, Cooper -v- Resch (1987-88) JLR 428 and Stephens -v- Stephens (1st November 1989) Jersey Unreported, as well as Channel Islands & International Law Trust Co. Ltd. and Ors. -v- Pike and Ors. (30th January 1990) Jersey Unreported and various paragraphs of the Rules of the Supreme Court Rule 18 and it is in the light of these various authorities that we approach this summons. In particular, we bear in mind that we are not trying the action, but merely exercising a discretion as to whether pleadings should be struck out, one of the tests adumbrated being that this should only be done in plain and obvious cases."*

Let us also for a moment consider very briefly the facts as pleaded in the Order of Justice. During the course of the hearing, we were shown the original letters from which Mr. Eves quotes in part. The facts are these.

(1) Blue Horizon, either in its own name or through Channel Islands Travel Group, its reservation business, made a hotel reservation for four persons under the name of Schnurrer with the defendant for a stay at St. Brelade's Bay Hotel from 4th - 11th September, 1993.

(2) The defendant sent a letter which required full payment of the account thirty days before the commencement of the holiday and reserved the right to cancel the reservation if that payment was not received.

(3) Blue Horizon's terms of business apparently were to confirm the reservations with no deposit but only to make full payment after the clients had stayed at the hotel and to be credited with commission whether the account was paid or not. Whether that was indicated to the defendant is not clear and would only be known at trial.

(4) The guests left the hotel and Blue Horizon assumed in law that the terms set out by the defendant no longer applied.

(5) On 5th November, the defendant wrote a letter to acknowledge that Blue Horizon were not in a position at present to settle the account in the sum of £2,464 and terms were arranged whereby settlement would be made by 1st December, 1993.

(6) On 1st December, Blue Horizon increased the interest payment from 2% to 3% and enclosed four post-dated cheques. The cheques were dated 4th January, 1994, 11th January, 1994, 18th January, 1994 and 25th January, 1994. Of those cheques, only one, dated 18th January 1994 was cleared. The others were not. Mr. Eves argues on several occasions that the "defendant took the cheques out of the banking system". We have seen the cheques; we have seen a letter from the Midland Bank. One of the post-dated cheques was presented and returned unpaid on four occasions; one of the post-dated cheques was presented and returned unpaid on two occasions; one cheque was paid on first presentation and one cheque was specially presented and returned unpaid. We repeat that we do not in any way wish to enter into the minutae of the case, but it does seem to us that in the light of the letter and the cheques, the statements made in the Order of Justice are insupportable. The final paragraph of the letter from Midland Bank confirms this:

> "*We can confirm that on 28th January, 1994 we specially presented cheques numbers 105413, 105414 and 105416. These cheques were forwarded to Barclays Bank for re-presentation. We were advised by Barclays that these cheques were being returned to us unpaid. Barclays walked the cheques and correspondence back to us.*"

We have no doubt that the defendant had the right to make the declaration of *désastre*. Mr. Eves complains most strongly that he had no right to be heard because the declaration was made by stealth. That may well be but we must remind ourselves that under the Bankruptcy (Désastre) (Jersey) Rules 1991, (Rule 2), ***"except by leave of the Court no application for declaration may be made unless the applicant has given the Viscount not less than 48 hours notice of his intention to make the application."*** It often happens in practice that on such notice being given to the Viscount, the Viscount recommends that the party who is to be declared *en désastre* be notified of the declaration, but it is not, and never has been, a requirement of the common law as it was, nor of the statutory law, as it now is. Mr. Eves seemed to be saying to us that he had a separate pot of money available which he used in emergencies (such as this) to top up Blue Horizon, and that during the winter, when there was a "hole" in the company's assets, it

was quite wrong for anyone to take precipitate action against his company, which had been established for very many years and had "a goodwill element of £281,562, based on a calculation formulated by the company's accountants". With Mr. Eves' permission (because we were not at all certain how that figure was arrived at), we enquired from the Viscount's Department and it was confirmed that at a meeting held in June, 1994, at the Viscount's Office, at which a representative of Mr. Eves' professional accountants was present, the profit trend over a three year period was produced (after the *désastre* declaration) and at Mr. Eves' request. Unfortunately, the figures were not put in writing, as Mr. Eves had not paid the accountants. In fairness to Mr. Eves, of course, he is right to have pleaded that the company's goodwill was immediately extinguished as soon as the declaration was made, because a quite phenomenal deficit of some £179,000 was exposed and this has led to the financial downfall of Mr. Eves and his family and to the enormous number of actions which he has brought unsuccessfully to remedy the situation.

In our view the whole of the arguments in the Order of Justice will be impossible to sustain. If Mr. and Mrs. Eves have a complaint in the terms of what they call the malicious prosecution, then their action surely lies within Article 6(3) of the Bankruptcy (Désastre) (Jersey) Law 1990, which reads:

> *"(3) Where, as the result of an application made by a creditor a declaration is made and the person in respect of whose property it is made is, notwithstanding the declaration, at the date of the declaration not insolvent, that person shall have a right of action against the applicant to recover damages for or in respect of any loss sustained by him as a consequence of the declaration, unless the applicant, in making the application, acted reasonably and in good faith."*

Let us recall the words of this Court in the hearing of 4th March, 1994 for the recall of the *déclaration en désastre:*

> *"The Court has considered already two such applications from you on behalf of the company and I do not think that I really need to add very much to what the Court said on those occasions. What the Bailiff said on the last occasion was this, and I am going to recite it in full for the benefit of this ruling:*
>
> > *"There is one more thing that the Court wants to say and it is this: all the property of Blue Horizon Holidays Ltd. is vested in the Viscount.*

Should the Viscount wish, at the request of - it would be impossible to say all - but the majority of creditors, both as to number and in substance, to make a Representation to this Court regarding the administration of the bankrupt Company, or regarding the possibility of its continued trading, the Court will, of course, listen to any such application, but it will have to be with the consent of the majority, I repeat, either in number or in substance, of the creditors."

We have been told this afternoon that the Viscount is not prepared, at this stage, to make a representation to the Court. If the majority of the creditors urged him to make such a representation we have heard from Mr. De Gruchy that the Viscount would consider very seriously whether he should make such an application. But at this stage he does not wish to do so."

Although we view the Order of Justice as totally unsustainable, we do not need to go any further at this stage than to say that there is no possibility in law of Mr. Eves and Mrs. Eves (and indeed their son), bringing a successful action, as drafted, as "directors and shareholders" of Blue Horizon and nothing has been shown to us today which allows them to bring the action in such novel form. For these reasons alone, we strike out the Order of Justice.

Authorities

Royal Court Rules 1992, as amended: Rule 6/13(1).

Bankruptcy (Désastre) (Jersey) Law 1990: Articles 6(3), 7.

Bankruptcy (Désastre) (Jersey) Rules, 1991: Rule 2.

Foss -v- Hardbottle [1843] 2 Hare 461.

Marrinin -v- Vibart [1963] 1 Q.B. 528.

Business Computers International -v- Registrar of Companies [1988] Ch 229.

Prudential Insurance No. 2. -v- Newman Industries [1982] Ch. 204.

Representation of Blue Horizon Holidays Ltd. (14th February, 1994) Jersey Unreported.

Representation of Blue Horizon Holidays Ltd. (18th February, 1994) Jersey Unreported.

Representation of Blue Horizon Holidays Ltd. (4th March, 1994) Jersey Unreported.

Representation of Blue Horizon Holidays Ltd. (11th March, 1994).

Representation of Blue Horizon Holidays Ltd. (6th May, 1994) Jersey Unreported.

In re Blue Horizon Holidays Ltd. (19th May, 1994) Jersey Unreported.

In re Blue Horizon Holidays Ltd. (28th September, 1994) Jersey Unreported, CofA.

Eves -v- Tourism Committee (4th October, 1993) Jersey Unreported.

Ayra Holdings -v- Minories Finance (31st March, 1992) Jersey Unreported.

Wenlock -v- Maloney (1965) 2 All ER 871.

Dyson -v- Attorney General (1911) 1KB 410.