

ROYAL COURT
(Samedi Division) 101

Hearing dates: 28th, 29th, 30th, 31st May, 1996.

Judgment delivered: 31st May, 1996.

Before: P.R. Le Cras, Esq., Lieutenant Bailiff.
sitting alone.

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|---------|--|--------------------|
| Between | Mayo Associates S.A. | First Plaintiff |
| | Troy Associates Limited | Second Plaintiff |
| | T.T.S. International S.A. | Third Plaintiff |
| And | Cantrade Private Bank Switzerland (C.I.) Limited | First Defendant |
| And | Touche Ross & Co. (being the party listed in Exhibit A to the Order of Justice.) | Second Defendant |
| And | Robert John Young (joined at the instance of the First Defendant) | First Third Party |
| | Anagram (Bermuda) Limited (joined at the instance of the First Defendant) | Second Third Party |
| | Myles Tweedale Stott (joined at the instance of the First Defendant) | Third Third Party |
| | Michael Gordon Marsh (joined at the instance of the First Defendant) | Fourth Third Party |
| | Monica Gabrielli (joined at the instance of the First Defendant) | Fifth Third Party |
| | Touche Ross & Co. (joined at the instance of the First Defendant) | Sixth Third Party |

Appeal by Plaintiffs against the Order of the Judicial Greffier of 6th February, 1996, directing the Plaintiffs pay to the First Defendants the sum of £250,000 and to the Second Defendants the sum of £230,000, by way of security for costs, and asking that the said Order be set aside.

Appeal by the First and Second Defendants against the said Order of the Judicial Greffier of 6th February, 1996, directing the Plaintiffs to pay to the First Defendant the sum of £250,000 and to the Second Defendant the sum of £230,000 by way of security for costs, and asking that the said sums be increased.

Advocate P. C. Sinel for the Plaintiffs.
Advocate A.R. Binnington for the First Defendant.
Advocate N.F. Journeaux for the Second Defendant.

JUDGMENT

5 THE LIEUTENANT BAILIFF: This is an appeal and a cross appeal from a Judgment of the Judicial Greffier dated 6th February, 1996, when he ordered the Plaintiffs to produce substantial sums by way of security for costs viz. £250,000 for the First Defendant and £230,000 for the Second Defendant.

10 The Plaintiffs accept that the learned Judicial Greffier's view of the law as set out in the Judgment is correct, (as do the Defendants) and, in general, consider that his approach to the costs involved is on the right lines, although they submit that nonetheless the figures ordered are too high (whereas the cross Appellants, the First and Second Defendants) consider that they are too low.

15 The Plaintiffs main contention, however, is that this is a case where no security for costs should be ordered at all.

20 In this connection, the Plaintiffs first ground was that they can demonstrate a high degree of probability of success; and with that in mind proceeded to a review of the pleadings and affidavits, and an attack on the findings of fact set out in the Judgment of the learned Judicial Greffier.

25 As an alternative and secondary ground, if the case does not meet that test, then nonetheless there would be an injustice to the Plaintiffs in being prevented from pursuing a proper claim by the order for security.

30 In this regard, the Plaintiffs' claim that if they were to meet the present order, quite apart from any subsequent order, they would not have sufficient funds to continue the litigation, which is not only important for them but important for those who entrusted funds to their keeping. Any order beyond a purely

nominal order of a few thousand pounds would, he submitted effectively close them out of the action and stifle it.

5 Mr. Stott is the owner of Mayo which acted as Trustee. Mr. Marsh and Mrs. Gabrielle own Troy which manages. TTSI was a subsidiary of Mayo.

10 Mr. Stott and Mr. Marsh claim to have been in the financial business, effectively on their own account, for a number of years, and to have a good reputation.

The sequence of events which has led to the present action has been, put briefly, as follows:-

15 1. Dr. R. Young, who traded in currency was introduced to Messrs. Stott and Marsh in about 1984. They claim to have investigated his *bona fides*.

20 2. After the 1987 Stock Market fall, the Plaintiffs decided to seek a safer haven for their clients' monies. They thus decided to deal in currencies. As the Troy forum put it "*in order to reduce risk, Troy primarily trades short term in the established "hard" negotiable currencies....*" This was done in order to maintain liquidity. They believed, Mr. Sinel submitted, that the Foreign Exchange market was safe.

25 3. Dr. Young introduced the Plaintiffs to Bank Cantrade, the First Defendant ("the Bank"). The Plaintiffs placed a part, later nearly the whole, of their fund at the Bank.

30 4. The Bank gave Dr. Young a good reference. On 10th July, 1990, for example, Mr. Morton for the Bank wrote as follows (at paragraphs two and four):-

35 "*Robert Young has been known to me for five years. His business dealings with the Bank have always been conducted with honesty and integrity. In his capacity as a foreign exchange trader, he has shown a high standard of professionalism. I have found his trading advice to be*
40 *astute and beneficial. I am confident that Robert Young would not enter into any contract or commitment he could not see his way to fulfil.*"

45 *The above references are given without responsibility on the part of the Bank or its officials".*

The letter was headed "To whom it may concern".

50 5. Without telling the Plaintiffs, and in consideration of Dr. Young's dealing with the Bank, the Bank charged a commission of four basis points on each trade executed by Dr. Young for the fund and gave half of this to Dr. Young.

- 5 6. In addition, and again without telling the Plaintiffs, the Bank provided, in some manner, a house it owned in Jersey in which Dr. Young could live. There was thus an initial failure by the Bank - by which the whole relationship of the Plaintiffs with the Bank was vitiated - to inform the Plaintiffs of the close link the Bank had with Dr. Young.
- 10 7. The Plaintiffs' claim that they did not understand the system of trading conducted by Dr. Young, and fairly soon after depositing funds at the Bank requested that all the records should go to Dr. Young, on whose figures they would rely.
- 15 8. The system of trading was that there was a trading account which was from time to time netted off from the deposit account; and that there was to be 10% downside limit, about which the Plaintiffs claim that the Bank knew. Payments were transferred from this deposit account and the trustee claims that it should have been advised when this occurred.
- 20 9. Such letters as the Plaintiffs or any of them received regarding the accounts (and there would seem to be a dispute about the number) were at best misleading and at worst deliberately misleading.
- 25 10. The Bank must have known what the Plaintiffs did not, which was that instead of the trading by Dr. Young being profitable, it was in fact disastrous and the Bank must have known this as they were the counterparty (unknowingly so far as the Plaintiffs were concerned) in each trade.
- 30

35 Notwithstanding this Mr. Morton (in 1991) and Mr. Stoneman (in 1993) attended the forums run by the Plaintiffs and, when they must have known that Dr. Young's figures were wrong, at best said nothing and at worst endorsed them.

40 11. As time went on the Plaintiffs placed nearly all the funds entrusted to their care to the Bank for this scheme, believing it was being run successfully.

45 12. Any suspicions they had were allayed by the employment, by Dr. Young or at his instigation, of Mr. Williams, then a partner in Messrs. Touche Ross, the Second Defendant, in January, 1992. Mr. Williams produced monthly statements based on Dr. Young's figures and confirmed them.

In particular, at the 1993 forum, by way of example, there was produced the following:-

5 We hereby confirm that we have reviewed the transactions of Dr. Robert J. Young of Troy Managers Ltd trading in the foreign exchange market on behalf of clients. Details of these transactions are contained in the attached schedules for the calendar years 1990, 1991 and 1992.

10 By reference to trading records of Dr. Young together with independent confirmations from third parties we have ascertained that the results are a true record of the transactions concluded".

"Touche Ross and Co".

15 Mr. Williams was at the forum, and affidavits have been produced to show that others besides the Plaintiffs relied on this as being a true record.

20 In late 1993, the Plaintiffs began to make inquiry and found that there was less money in the bank account than they thought should have been the case.

25 In short, nearly all their clients lost money, some of them considerable sums, which the Plaintiffs (who have also suffered losses which they are trying to recover) are trying to recover for them.

In consequence, the Plaintiffs bring the action under a series of separate heads, including *inter alia* fraud.

30 During his outline of the Plaintiffs' case, Mr. Sinel made, as the Court thought he must, a series of admissions, *inter alia*:-

- 35 a) that no alarm bells rang in 1991 when, on the letters Mr. Stott agreed he had received, the balances did not appear to agree with the figures from Dr. Young.
- 40 b) he was, in the view of the Court, unable to produce any affidavit explaining why the Plaintiffs had not regularly and competently checked the accounts for which they were responsible against the figures provided from the Bank.
- 45 c) there were no clear explanations as what monies were taken, or precisely for whom or on what grounds, apart from a statement to the effect that Dr. Young's figures were confusing.
- 50 d) it was, with hindsight, difficult to understand why the Plaintiffs had relied on Mr. Williams' certificates, to help them with their sales, when they had not themselves commissioned Mr. Williams.

e) again with hindsight, it had perhaps been unwise to entrust Dr. Young with all the trading and with, as the Plaintiffs say, sole or virtually sole access to all the Bank records.

5 f) that, and yet again with hindsight, it was difficult to explain why no alarm bells rang with the receipt by Mr. Marsh of a letter from Dr. Young dated 26th March, 1990.

10 The Court did not find the letter easy to construe, but it does appear to indicate that the Bank was offering a fee based on the Bank's own profits. It was conceded that the precise meaning and consequences of this letter were not clarified at the time; an attitude which is similar to the apparent acceptance of the fact that Dr. Young's accounting was confusing.

15 g) it was accepted that there was nothing in the Bank mandate which required the Bank to notify the Plaintiffs when "netting off" the accounts.

20 h) that Mr. Marsh let his house in Bermuda on 31st December, 1994, for seven years with a seven year option to his daughter on condition that she saw to the repairs which can only be explained as attempting to ensure that it was safe (for the time being) from his creditors.

25 The Defendants cross appeal was led by Advocate Journeaux for the Second Defendant.

30 Following submissions on the law, to which the Court will return later, he made a series of points.

35 First and foremost, there was, he submitted, no overwhelming case. In those circumstances the financial position and information given by the Plaintiffs was highly relevant.

40 Apart from the admissions from the Plaintiffs noted above, there was no evidence, which there should have been, as to who the investors were, what their assets were and (apart from three) what their views were regarding the litigation as against what Mr. Marsh said they were.

45 There was no application for a representation order and the investors were hardly likely to volunteer to put up further monies.

50 In addition, there was no information regarding recovery of overpayments or any explanation regarding withdrawals of some \$16,732,000.

Further, the statements by the Plaintiffs as to the assets they claim to have are not backed by any or any sufficient information,

5 This was a paradigm case for ordering security for costs; and the Court should bear in mind that even if such an order would stifle the action that that was not, *ipso facto*, a reason for not making it.

10 There was, he submitted, not sufficient material before the Court such as would enable it to strike out the defence. Discovery has not yet been made; and the Court is certainly not in a position to say that the Plaintiffs have a high probability of success.

15 Furthermore, such a probability becomes, he submitted exceedingly remote when the correspondence is examined.

20 Not content with handing the accounts to Dr. Young and not making any or any proper inquiry from the Bank as to the accounts the Plaintiffs were informed, and have (in their pleadings admitted to being informed of the balances on a number of occasions, the Bank having written not only on 18th January, 1991 but again on 13th March, 1991, 22nd September and 10th December 1992, and 1st April, 26th May and 1st June, 1993, the last two letters being just before the 1993 Bermuda forum.

25 On receipt of any one of those letters every alarm bell should have been ringing.

30 In these circumstances the Plaintiffs, and certainly Mr Stott, must have had much more knowledge of the accounts, whether before or after the involvement of Mr. Williams than that to which he admits.

35 Furthermore, any involvement by Mr. Williams started in January, 1992. Thus the figures at the 1991 forum were those of Mr. Stott alone; what did he - an accountant - think he was doing?

40 Furthermore, as late as October, 1993, it would appear that Mr. Stott was again relying on Dr. Young's figures.

45 There were, he submitted, clearly a number of arguable points, and in addition a question of prescription on some of the claims had been pleaded.

50 The Plaintiffs had produced no, or at any rate insufficient evidence to show that the Defendants had caused the Plaintiffs impecuniosity.

Further, for such a claim to succeed in this case, the Court would, in effect, have to find that there was an overwhelming

case. They could not show that this was the case at present, unless it were clearly demonstrable, which it is not.

5 Mr. Binnington, for the First Defendants, the Bank, concurred with Mr. Journeaux's views as to the law and with his submissions regarding the criticisms of the defects in the disclosures by the Plaintiffs of their financial assets.

10 So far as the action against the Bank was concerned, the allegation was primarily one of fraud. Guilty knowledge against the Banks' officials would have to be proved.

15 The Court should not use this hearing as a mini trial and should bear in mind that summary judgment cannot be given where fraud is alleged.

20 In terms, the pleadings state quite clearly that what the Plaintiffs did was up to them and the Bank had done its duty as requested. It was told to act on Dr. Young's orders and to stop sending documents to Geneva and did as it was asked.

The real problem here was the incompetence (on the kindest interpretation) of the Trustee.

25 As to the knowledge of the figures at the forums, these were percentage figures not figures of balances; other Banks were believed to have been used for trading; Mr. Stoneman (at the 1993 forum) refused to speak to at least one customer about Mayo; and by the agreements in the bundle for depositors to sign, the Bank was neither to act as underwriter nor to be liable for administration or management.

30 To summarise, at this point, there was much to be proved at trial.

35 Any reasonably sophisticated investor, the Bank has pleaded, should know that currency trading is risky. Mere receipt of the brochures does not mean approval. It was Mr. Marsh who asked Mr. Morton for a reference for Dr. Young.

40 The Troy traders at the 1991 forum were stated to be experienced and highly disciplined and for them to rely wholly on Dr. Young and give the whole control to him was to invite disaster, quite apart from any view taken as to the weight of the statement.

45 To summarise, it would be unsatisfactory, to come at this stage, to too certain a view as to the result of the case. Trial by affidavit, as it were, was dangerous with the affidavits as they were. There were a good many questions to be asked of the Plaintiffs, and, indeed, of any investors who turned up.

As an instance of the dangers involved, he cited Dr. Young's letter of 26th March, 1990, to Mr. Marsh. What happened as a result? Why had Mr. Marsh not referred to it?

5 As to stifling the action, the Plaintiffs had not demonstrated that this would indeed be the effect of any order which should properly reflect the losses the Defendants might well suffer were they to succeed; and of course they could not touch the funds unless they did succeed. The position and reaction of
10 the general investors was simply unknown.

In reply, Mr. Sinel made the point that they could not go to the investors for "some" money. It had to be for a certain sum and it was doubtful if the Judgment of the learned Judicial
15 Greffier would have filled them with much enthusiasm.

This was commercial litigation and the Court must take heed of the suggestion that the Defendants would strangle it pre-trial if they could; it was cheaper than paying damages.
20

The Plaintiffs were pursuing several different actions and avenues which increased costs. Put simply they did not have, at this stage, £500,000 to put up, and even a much lesser figure would block them.
25

In his submission the affidavits and the pleadings show a strong probability of success. If the Court did not accept that, then it had to be in the interest of everyone concerned that the case should come on and the evidence heard out; and that
30 submission applied just as strongly to the Bank's officers (if they were innocent) as to anyone else.

This then is a brief summary of the allegations and assertions put to the Court.
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All the parties were agreed that the learned Judicial Greffier had correctly set out the law and that Keary Developments Ltd -v- Tarmac Construction Ltd & Anor [1995] 3 All ER 534-544 should be followed (see his Judgment of 6th February, 1996, at
40 p.10 et seq.). As he has there set out the relevant parts of the Judgment in full, the Court will forbear from doing so again.

First, the Court must bear in mind all the circumstances of the case.
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Second, the possibility or probability that the Plaintiffs will be deterred from pursuing their claim is not without a sufficient reason for not ordering security.

50 Here it will be recalled the Plaintiffs have in terms claimed that anything more than a nominal payment will debar them from continuing, and they fear that even if they meet any order made

now, that they will be unable to meet any subsequent order so that the action would be effectively stifled. This, however, of course, is not by itself conclusive.

5 Mr. Sinel accepts, however, that although he considers the costs to be inflated they must, of necessity, be high, reaching in the combined accounts and estimates of the Defendants somewhere in the region of £1,000,000, and it is against those figures that he has made his submissions.

10

Given that submission the Court has, as yet, not heard counsel regarding the costs.

15 Third, the Court must carry out a balancing exercise. The test laid down in paragraph three of Keary (see the learned Judicial Greffier's Judgment p.12 line 12) is quite clear, but before coming to it, consideration must be given to the fourth point in Keary.

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This (p. 12 line 36) shows that the Court should have regard to the Plaintiffs' prospects of success but should not go into detail unless it can be demonstrated that there is a high degree of probability of success or failure.

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Here a good deal of detail has been before the Court and indeed it is difficult to see how this can be avoided where there is a claim that there is a high degree of probability of success.

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Now, the Court finds that it should declare its view at once on this point.

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In essence the Plaintiffs' claim is that Dr. Young and the Bank knew each other and did not advise the Plaintiffs; the Bank gave Dr. Young a reference; gave him a secret commission (which encouraged him, at best, to churn the account); put him into a house; and went to the 1991 and 1993 forums lending the Bank's name to the claims the Plaintiffs' made at a time when the Bank knew that these must have been wrong and had not advised the Plaintiffs. Against that the Plaintiffs ceased to monitor Dr. Young and asked the Bank to send all statements to him, an action which invites scrutiny; took no notice when Dr. Young wrote to Mr. Marsh on 26th March, 1990; took no notice of letters which should have warned them and gave out statements on Dr. Young's figures, not statements from the Bank, besides which they must prove guilty knowledge against the Bank's employees.

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So far as the claim against Mr. Williams is concerned, a great deal depends, it would seem, on what he did as against what he was asked to do. The Plaintiffs claim (and the brochures indicate) that they relied on him for marketing. Against that it was Dr. Young who asked him and it seems possible that he only

looked at Mr. Stott's figures, which Mr. Stott must have known or should have realised.

5 The case involves clear allegations of fraud and in the view of the Court it would be wrong, prior to the evidence having been heard out, to go so far as to find that the Plaintiffs have shown a strong probability of success.

10 In those circumstances (see Judicial Greffier's Judgment p.12 line 12 Keary para. 3) the Court must carry out a balancing exercise, the passage reading:

15 *"The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have*
20 *been incurred by him in the defence claim".*

25 Before engaging on such a balancing exercise the Court must (see paragraph 5 of Keary Judicial Greffier's Judgment p.12 line 52) bear in mind that the Court may order any amount up to the full amount claimed, provided it is more than a simply nominal amount.

30 The problem here is that the Plaintiffs claim that even a comparatively nominal amount, say £100,000 at this stage, bearing in mind their own costs, would stifle the action.

35 In considering this claim the Court (see Keary paragraph 6 Judicial Greffier's Judgment p.13 line 6) must be satisfied that an order for security would stifle a valid (see below) claim.

40 Although the Court is not entirely satisfied with the evidence placed before it by the Plaintiffs in this regard, it is satisfied that there is evidence to show that the claim, given the enormous costs involved, would probably be stifled and that the Plaintiffs are not likely to be able to meet any reasonably large sum for security and continue, nor do they have, at this stage, any reasonable expectation of raising further funds from their investors who have already suffered serious losses.

45 Anything more than a nominal sum for security would, in the view of the Court, stifle the action. Given this finding the Court must return to the balancing exercise set out above.

50 First and foremost, in the view of the Court, the claim is in terms a proper one, and one which the Court finds is genuine. The allegations are highly serious and require an answer, and the

claim is one which the Plaintiffs should not be stifled from bringing forward.

5 That the case should be enabled to proceed will permit the evidence of all the parties to be heard out and any liabilities properly fixed; and give those whose honesty and reputation is under attack an opportunity to meet, and if innocent, rebut such allegations.

10 Further it appears to the Court that the only real hope the investors have of proper compensation for their losses depends on the action being heard out, following which they should have an opportunity properly to assess their situation.

15 These considerations provide sufficient weight to require the Court to ensure that the action is not stifled by an order for security for costs and to permit the action to go forward. In the view of the Court any order for provision of a sum for security for costs in this case would amount to an instrument of
20 oppression.

The appeal of the Plaintiffs is therefore granted and the cross appeal of the Defendants dismissed. There will be no order for security for costs and the applications of the Defendants for
25 such an order are dismissed.

Authorities.

Rothmer & Ors. -v- Hill Samuel (Channel Islands) Trust Company, Limited & Ors. (9th January, 1991) Jersey Unreported; (1991) JLR N.3.

Pacific Investments Ltd -v- Christensen & Ors. (13th September, 1995) Jersey Unreported.

Burke -v- Sogex International Ltd (1988) JLR 633-638.

Parkwood Ltd -v- Midland Bank PLC (20th October, 1994) Jersey Unreported.

M.V. Yorke Motors, a firm -v- Edwards [1982] 1 All ER 1024-1028.

Keary Developments Ltd -v- Tarmac Construction Ltd & Anor [1995] 3 All ER 534-44.

J.L. Young Manufacturing Company [1900] 2 Ch. 753.

Thomas Ltd -v- Barcrest Ltd No.3 [1995] RPC 138.

Flender Werft AG -v- Gatoil Overseas Inc. [1990] 2 Ll R 27.