230.

ROYAL COURT
(Samedi Division)

18th December, 1997

Before: Sir Philip Bailhache, Bailiff, and Jurats Myles and Potter

Between:	**Mayo Associates SA** **Troy Associates Ltd.** **TTS International SA**	**Plaintiffs**
And:	**Cantrade Private Bank Switzerland (C.I.) Limited** **Touche Ross & Co.**	**Defendants**
And:	**Robert John Young** **Anagram (Bermuda) Limited** **Myles Tweedale Stott** **Michael Gordon Marsh** **Monica Gabrielli** **Touche Ross & Co** **Cantrade Private Bank Switzerland (C.I.) Limited**	**Third Parties**

Advocate P. C. Sinel for the Plaintiffs
Advocate A. R. Binnington for the First Defendant

Representation of Cantrade Private Switzerland (CI) Ltd seeking the appointment of the Viscount for the purpose of communicating or otherwise dealing with an open offer made by the Bank to certain investors who have lost money as a result of trading activities which are the subject of the action.

JUDGMENT

THE BAILIFF:

Introduction

This is a representation of Cantrade Private Bank Switzerland (C.I.) Limited ("Cantrade") in the context of an action brought by Mayo Associates SA ("Mayo", a company incorporated in Geneva), Troy Associates Limited ("Troy", a company incorporated in Liberia) and TTS International SA ("TTSI", a company incorporated in Panama), to which we shall refer collectively as "the plaintiffs", against Cantrade and Touche Ross and Co., a firm of chartered accountants. The representation seeks the appointment of the Viscount for the purpose of communicating or otherwise dealing with an open offer made by Cantrade to certain investors who have lost money as a result of

trading activities which are the subject of the action. It is convenient to record here that the Viscount is inter alia the executive officer of this Court.

The background to the representation was succinctly described by Gloster JA when delivering the judgment of the Court of Appeal in relation to an interlocutory matter on 3rd July, 1997 in following terms:

> *"The plaintiffs, who at material times, traded as the Troy Trust Service, and for this purpose I make no distinction between the individual plaintiffs, are the investment managers, administrators and, at least to some extent, trustees of certain investment programmes called the TTS and TTSF programmes. The precise extent to which the plaintiffs, or one or more of them acted as trustees or otherwise owed fiduciary obligations and duties to investors and, if so, whether under Swiss or Jersey Law, may well be issues in the proceedings.*
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> *The amended Order of Justice alleges that the plaintiffs arranged for the investment of funds subject to the programmes in foreign exchange dealings, through facilities to be provided by the first defendant, Cantrade Private Bank Switzerland (CI) Limited, which I shall refer to as "the bank", an indirect subsidiary of the Union Bank of Switzerland Group of Zurich.*
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> *It is alleged by the plaintiffs that a Dr. and Mrs. Young and their companies were appointed as agents on behalf of the plaintiffs to manage the foreign exchange dealings and to give instructions to the bank in relation to such dealings. Although purported overall profits were reported to the plaintiffs in respect of such dealings, and the plaintiffs, in turn, reported such profits to investors, in fact consistent and substantial losses were incurred in respect of the foreign exchange dealings and consequently substantial sums were lost by investors.*
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> *The plaintiffs allege that the bank is liable for the losses incurred on the basis, inter alia, of constructive trust, equitable fraud, negligence and breach of contract.*
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> *The plaintiffs have also sued the accountants, Touche Ross, on the grounds that that firm allegedly audited and certified the purported results of the foreign exchange dealings conducted by Dr. Young's companies on behalf of the plaintiffs, but the present application is not in any way concerned with that part of the action as against Touche Ross.*
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> *The plaintiffs' amended Order of Justice claims damages and/or compensation not only in respect of investors' losses amounting to some $27m. but also in respect of the plaintiffs' own alleged losses of past and future profits for commission and other matters amounting to some $18m.*
>
> *Cantrade denies liability to the plaintiffs and contends that responsibility lies with Dr. Young and/or the plaintiffs and/or individuals who were officers of the plaintiffs and/or Touche Ross. The plaintiffs' action is not in the form of an action by the plaintiffs, as trustees, to recover trust monies on behalf of beneficiaries. Rather the case is put on the basis that the plaintiffs' acquired title to the funds deposited by investors. The plaintiffs'*

advocates do not act for the investors or so the bank contends. Criminal prosecutions have recently been instituted in Jersey against Dr. Young, the bank and others and the Court understands that the criminal trial is due to be heard sometime in 1998. It is common ground that the civil trial cannot be heard until after that date.

The bank which, as I have said, denies liability for the losses which investors have suffered, has decided to make an ex gratia offer to investors to compensate them for their losses plus interest. The bank is not prepared to offer compensation to the plaintiffs for their own alleged loss of profits. These offers have been made by the bank directly in the case of those investors whose names and addresses it knows, but save through the medium of press advertisement, the bank has not been able to communicate with the other investors whose names and addresses it does not know."

Cantrade accordingly seeks an order of the court requiring the plaintiffs to release to the Viscount the names and addresses of the investors so as to enable the offer which it has made to be communicated unambiguously and effectively to the investors. It is an unusual and indeed unprecedented application. Mr. Sinel for the plaintiffs argued strenuously that the Court had no jurisdiction to give this relief. We shall return to this submission in due course. But first we set out the contentions of the parties on the merits.

The contentions of Cantrade

Mr. Binnington opened by urging that the Court should approach the application with an open mind uninfluenced by the admitted fact that criminal charges had been brought against Cantrade and one of its officers but not against any of the plaintiffs or their directors. He pointed out that the management of Cantrade had changed and that Cantrade alone had tried to compensate the investors. He suggested that the discovery of documents in the main action had revealed matters which did not cast the directors of the plaintiffs, but particularly Mr. Marsh, in a favourable light.

The principal points made by Cantrade appear to us to be as follows:

(1) It was submitted that the plaintiffs have massive conflicts of interest. The Order of Justice and the pleadings show that the relief sought against Cantrade falls broadly under two heads. Firstly, the plaintiffs claim damages in respect of losses allegedly suffered by investors as a result of Dr. Young's trading. The figure claimed is about $27 million. Secondly, the plaintiffs claim for their own alleged losses, principally in lost commissions, which are put at over $17 million. Mr. Binnington asserted that the plaintiffs' attitude to the offer of compensation for the investors was inevitably coloured by self-interest. He drew attention to a letter from Philip Sinel & Co. of 13th January, 1997 in which it was stated:

"The investors are not the Plaintiffs in this action. Although the Plaintiffs are mindful of their responsibilities to the investors, the Plaintiffs have responsibilities to themselves and the shareholders who are as you know Marsh, Stott and Gabrielli."

Mr. Binnington submitted that this conflict of interest had led to a gross mishandling of Cantrade's offer. The first approach was made in a without prejudice letter of 18th December, 1996. The appropriate response from a party with a genuine concern for the investors' interests, would have been an exploration of the offer. In fact the reply from Philip Sinel & Co. of 19th December, 1996 stated that *"we feel it unlikely that we will be able to recommend*

any solution to our clients which does not dispose of Action 94/254 in its entirety". It was submitted that the offer was in effect rejected because the plaintiffs were excluded from it. An open offer followed on 10th January, 1997 in a letter from Mourant du Feu & Jeune. In broad terms the offer was to compensate investors for their foreign exchange trading losses together with commercial interest. Mr. Binnington submitted that the sequence of events thereafter was significant. On 14th January, 1997 Philip Sinel & Co. replied at length concluding that it was unrealistic to expect the plaintiffs to accept any proposal which did not in effect compensate both the plaintiffs and the investors. On 16th January, 1997, on the evidence of Mr. Marsh, every investor was sent a copy of a Daily Telegraph article describing the offer together with a bulletin (TTS Bulletin: No.16) issued by Mayo. The offer was communicated to the investors therefore after it had been rejected by the plaintiffs on 14th January. On the same day, 16th January, 1997, Mourant du Feu & Jeune wrote to Philip Sinel & Co. pointing out that the offer was addressed to the investors and not to the plaintiffs and requesting co-operation in contacting the investors to communicate the offer. Philip Sinel & Co. replied on 28th January indicating that they had fully understood the nature of the offer and that "after consultation the offer is rejected". On 28th January Mourant du Feu & Jeune wrote to inform the plaintiffs' lawyers that they would be taking steps to contact the investors direct with Cantrade's offer of compensation and alleging a failure to co-operate in supplying names and addresses of TTS investors. On 30th January, 1997 Philip Sinel & Co. replied stating that this information could not be supplied because the plaintiffs owed a duty of confidentiality to the investors. Cantrade therefore placed a series of advertisements in leading newspapers setting out the terms of its offer. On the evidence of Mr. Marsh a copy of the complete Financial Times' advertisement was sent to investors. But Mr. Binnington submitted that the effectiveness of that communication was vitiated by another bulletin (TTS Bulletin No.17) which apparently went with it. We shall return to that bulletin below. In summary he submitted that the plaintiffs were blocking any offer to compensate the investors unless their own alleged loss of commissions was included, and that their conduct disqualified them from acting as a channel of communication of the offer.

(2) It was submitted that the plaintiffs' own misconduct makes them unsuitable to be custodians of the investors' interests. Mr. Binnington submitted that Mr. Marsh was implicated in a conspiracy to corrupt Mr. Peter Morton who was the Cantrade officer dealing with the Troy Trust Service. This allegation emerges from an exchange of correspondence between Dr. Young and Mr. Marsh. On 3rd August, 1990 Dr. Young sent a fax to Mr. Marsh which included the following paragraphs:

"4. Cantrade. A little background news. Mike, I know that you'll be heartbroken to hear of this, but your friend and hero Mr. Delf is departing the bank in January in order to devote himself to his sheep. He is to be replaced by a Mr Karl Deutschle (?): a Swiss, presumably. Karl has a background in FX. He was head of dealing at UBS London some time ago. Zurich are interested in all the FX business that has been going on in Jersey; I'd like to think that Karl's appointment reflects this.

I have been speaking to Peter about changes in the bank etc. One piece of information which has emerged is that he does not have any direct personal financial interest in what we are doing. I had assumed that he received a bonus related to the FX desk's profit. In fact, he does not. This is (in my experience) quite unusual. I wonder if we ought to do anything about this?"

Mr. Marsh replied on same day.

"I have shed a few tears over Delf. Presumably, he'll invite us to his grand farewell, champagne party in Jersey ... trouble is, the new chap may be an interfering royal pain, unlike the doddering sheep-raiser we know. Hopefully, Peter will retain full control of the situation. If you would like to pay Peter something out of our lot, you have my permission to do so but it will have to be done most discreetly indeed."

Mr. Marsh denies that this constituted an agreement to bribe Mr. Morton. He could not recollect "the specifics" of this faxed exchange but he did remember agreeing that Dr. Young could give Mr. Morton a "one-off Xmas present" such as a vase, decanter or ashtray. He denies in fact having any close relationship with Mr. Morton. Mr. Binnington submitted that it was not remotely credible that an exchange of this kind in August could refer to a Christmas present.

Mr. Binnington drew further support for this contention from correspondence involving the proposed bribing of a Nigerian oil minister. On 24th August, 1990 Mr. Marsh sent a fax to Dr. Young including the following passage:

6. The Nigerian matter is boiling up. Sam Renner, my contact in Geneva says the chief of investment has passed on the documentation to the Chief Minister of Oil who is all-powerful and can agree at a stroke to give us a billion dollars or much more. He is in Vienna this weekend for an Opec meeting and Sam is trying to find out how to contact him and get him to Geneva or London or make an appointment for us to see him in Vienna or wherever. Sam is especially insistent on me being there - and I will do whatever he feels must be done to close this size of account. Thus, I am tentatively booked to leave here August 31 arriving London Sept. 1 with a view to haring down to Geneva to meet his nibs if necessary.

Sam says all these chaps are interested in seeing white faces and knowing what's in it for them. I suggested for that kind of size account we might go to giving 25% of our 20% net profit commission to the Minister every year in addition to covering Sam for something."

Most significantly, perhaps, Mr. Binnington submitted that the investors were misled as to the amount of commission which the Troy Trust Service charged. The promotional literature showed that for the TTS-F accounts there was an initial entry charge, an annual "incentive" fee of 10% of profits and trustee fees of 0.4% per quarter. It is not disputed that there was a further annual charge which was not disclosed to investors of 15% of Dr. Young's alleged profits split as to two thirds to Dr. Young and one third to Mr. Marsh and Miss Gabrielli. In effect, it was submitted, investors were charged 25% of profits from trading whilst they were told that it was 10%. The evidence of Mr. Marsh was that this extra charge was justified because Troy Trust Service was a "fund of funds" and Dr. Young was an outside trader to whom this 15% was a legitimate payment. Mr. Binnington submitted that this was dissimulation and that there was ample evidence that Dr. Young was part of the Troy team. He drew attention to the misleading of individual investors. One example concerned an investor (whose name had been deleted from the papers) who queried the figures. Mr. Marsh wrote to Mr. Stott on 27th February, 1993 :

"RE:

M , with whom I spent a great deal of time in Orlando, wants to invest but he's very nitty picky. I managed to answer most of his questions except one: he asked how we can reconcile the Troy Report gross FXDL figure for performance for 1992 of 10.5914% with the TTS net performance (Exclusive of performance fee) for the same period of 7.632%.

Of course, this is not the first time such a question is asked. One answer is clearly that the 0.4% per quarter Mayo fee equals more than just 1.6% if valuations are rising since fees are paid quarterly. But, even at 2%, this would leave 8.59%, still a discrepancy of almost 1%.

I know that Rob's fee comes off first but we can't inform the client of that unless we absolutely have to. Have you any ideas as to how we can come up with an answer?"

Mr. Stott replied on 5th March, 1993:

"Thanks for your fax of 27th February 1993.
I suggest you tell that the difference occurs because of different management/dealing of 'FXDL' accounts and 'TTS General' accounts. This should encourage him to open an FXDL account with a high sum!

The real answer is, of course Anagram's 15% on gross."

(3) It was submitted that the plaintiffs are open to criticism in their conduct of this litigation. Mr. Binnington submitted that one of the main planks of the plaintiffs' case against Cantrade was that, unknown to them, Cantrade secretly paid "bribes" to Dr. Young. He referred to paragraph 69 of the amended Order of Justice which set out:

"Cantrade:Secret Payments

69. Paragraph 21 above is repeated. Pursuant to the agreement between Mr Young and Cantrade therein mentioned, between about March 1988 and about November 1993, Cantrade (with knowledge that AEL/Anagram and/or Mr. Young and/or Mrs Young were the agents of Mayo and/or TTSI and/or Troy acting for reward) paid to AEL/Anagram and/or Mr Young without the knowledge or consent of Mayo and/or TTSI and/or Troy fees in respect of foreign exchange transactions conducted on their behalf totalling approximately US$2,750,000, which AEL/Anagram and/or Mr Young and/or Mrs Young accepted in breach of their respective fiduciary duties to Mayo and/or TTSI and/or Troy."

The plaintiffs were unaware of the above matter until May/June 1994."

In the plaintiffs' submissions to the Court of Appeal in July 1996 the secret payments were dealt with as follows:

"Cantrade agreed to pay Young half the profits derived from dealings with the Plaintiffs. Cantrade levied a charge of four points on each transaction and split that charge 50/50 with Young. This was particularly detrimental to the Plaintiffs as it gave Young an incentive to churn, ie to trade and to be rewarded irrespective of the results to his principals."

Mr. Binnington submitted however that the Anton Piller documents received by Cantrade in March/April 1997 showed beyond doubt that Mr. Marsh and Miss Gabrielli (i) were well aware that Cantrade was making payments to Dr. Young, (ii) agreed with Dr. Young to split them 50/50, (iii) took care to conceal this arrangement from Mr. Stott and (iv) also kept this hidden from the investors.

In summary the principal contentions of Cantrade were that the plaintiffs had misrepresented the terms of the offer, were in the position of having a classic conflict of interest, and stood impugned with serious misconduct.

The contentions of the plaintiffs

The principal contention of the plaintiffs was that the Court had no jurisdiction to grant the relief sought by Cantrade; we shall return to this issue below. Before making his submissions Mr. Sinel sought and obtained leave to cross-examine Johann George Barlocher, the current Managing Director of Cantrade, on his affidavit, albeit limited to the question of Cantrade's motivation in making the offer to the investors. Mr. Barlocher conceded that the offer would not have been made but for the action brought by the plaintiffs. He agreed that he personally had not been originally in favour of making an offer to the investors. He took the view that Cantrade was innocent until proved guilty. Mr. Barlocher was asked what had prompted the bank to make the offer; he responded that the prosecution of Cantrade had been the prime reason although he also asserted that the bank had a "big heart" as well as a deep pocket. It had been realized that the civil proceedings would not be concluded until after the criminal trial. There would therefore be a long delay and they decided to pay off the innocent investors. It was put to him that Cantrade wished in effect to drive a wedge between the plaintiffs and the investors, and he was asked about the assignment of any rights of action which the investors might have against the plaintiffs. Mr. Barlocher's evidence was that it had not been decided whether or not to use the letters of assignment to mount a counter-claim against the plaintiffs although he conceded that it was a possibility.

Mr. Sinel asked the Court to take into account the history of the relationship between the parties. The plaintiffs had been in business successfully for many years before becoming involved with Cantrade. Mr. Marsh had then met Dr. Young who had appeared to be a reputable adviser. The plaintiffs had been unaware until 1994 of the closeness of the relationship between Cantrade and Dr. Young and in particular of the arrangements made by Cantrade with the relevant Jersey authorities for permission to be obtained for Dr. Young to reside in a bank house.

Mr. Sinel submitted that the Cantrade offer was inadequate; the bank was not offering to repay the excessive commissions which had been charged, nor to put the investors back in the position in which they would have been but for the fraud. If the money had been invested somewhere else the investments would have grown by 200% or 300%. The offer also made no provision for contributions which investors had made to the plaintiffs' legal expenses. Many of these contentions were supported by the evidence of Ian Bisset Weedon, one of the investors.

Counsel for the plaintiffs submitted that all the investors already knew of the offer. When asked by the Court whether the offer had been put dispassionately to the investors, Mr. Sinel conceded that the plaintiffs had passed on the offer with their own commentary. He added however that Cantrade wished now to add its own commentary to the offer.

Mr. Sinel argued, in relation to Dr. Young's additional 15% commission on profits in which the plaintiffs were sharing that this represented a saving on the usual 20% foreign exchange commission which would be paid by a Fund of Funds. He submitted that investors were aware of the nature of the fund. In any event the true total percentage was 21.9% and not 25%.

The Law

Counsel for the plaintiffs argued strongly that the Court had no jurisdiction to make the order sought by Cantrade. There was no precedent for such an order and it would be ultra vires. The Royal Court Rules did not contain a power to make the order, and it would be a usurpation of the authority of the Superior Number and the Rules Committee to invent such a power. The power to appoint an administrator was limited to cases where the assets were in the jurisdiction but the owners had temporarily departed these shores. Moreover Cantrade had no locus standi to make such an application. Mr. Sinel submitted that the Court's inherent jurisdiction to regulate civil proceedings was limited; it did not extend to the ability to order anything it thought necessary to do justice in pending proceedings. Such a claim was described by Professor Dockray, in an article in the Law Quarterly Review entitled "The Inherent Jurisdiction to Regulate Civil Proceedings" (LQR Vol 113 page 120) as ***"an invitation to the Court to assume virtually despotic powers"***. Mr. Sinel drew further support for these contentions from dicta of both the English Court of Appeal and the House of Lords. In Bekhor Limited v. Bilton [1981] QB 923, at 942 Ackner LJ rejected the contention that ***"the courts have a general residuary discretion to make any order necessary to ensure that justice be done between the parties"***, stating that ***"that is too wide and sweeping a contention to be acceptable"***. In the Siskina [1979] AC 210, at 263 Lord Hailsham LC attacked the argument that ***"the judges need not wait for the authority of the Rules Committee in order to sanction a change in practice or extension of jurisdiction"***, stating:

> ***"The jurisdiction of the Rules Committee is statutory, and for judges of first instance or on appeal to pre-empt its functions is, at least in my opinion, for the courts to usurp the function of the legislature. Quite apart from this and from technical arguments of any kind I should point out that the Rules Committee is a far more suitable vehicle for discharging the function than a panel of three judges, however eminent, deciding an individual case after hearing arguments from advocates representing the interests of opposing litigants, however ably. The Rules Committee is presided over by the Lord Chancellor, is representative of all parts of the judiciary of the Supreme Court, both of the High Court and the Court of Appeal, and of both branches of the legal profession and of the Lord Chancellor's departmental officials. To follow Lord Denning MR in his invitation to pre-empt its counsels is not merely to usurp the function of a legislative body entrusted by Parliament with a particular task. It is to remove a function properly exercised by a representative body able to examine a question from all relevant points of view and hand it over to a particular panel of judges deciding an individual case. Even if such a usurpation were legitimate, which in my view it is not, it would in my judgment be highly undesirable."***

These sentiments were echoed by Tomes DB in Re Lampaert 1990 JLR 290, at 293 and Hamon DB in Re the representation of AB, (5th July, 1995) Jersey Unreported.

Mr. Binnington responded to these contentions by submitting that, despite these cautionary utterances, the Court did have wide powers pursuant to its inherent jurisdiction to do justice between the parties. In Finance and Economics Committee v Bastion Offshore Trust Co. Ltd. (1991) Jersey Unreported CofA, Neill JA stated in the context of the Court's inherent jurisdiction:

> ***"Rules of procedure have to be servants not masters. Their function is to ensure that cases before the Court are conducted in an orderly and expeditious manner and so that the attainment of a just result is furthered."***

Counsel also referred to English cases when the Court had taken the conduct of an action away from one party and given it to another. It was submitted that this power was particularly apposite where the action was brought by one person on behalf of others, and there was reason to fear a conflict of interest.

The maxims *"la Cour est toute puissante"*, and "the Court is master of its own procedure", are well known. Nevertheless the authorities cited by Mr. Sinel sound a powerful warning to the Court against overstepping the mark either by assuming disproportionate powers or by trespassing into the province of the legislature or the Superior Number sitting in its rule-making capacity. There is no doubt however that inherent powers are wide and important and have a useful role to play in the attainment of justice. The article by Professor Dockray to which we have been referred contains the following passage at page 130:

> ***"Factors which have been treated as influential in novel cases include the contribution which the proposed power could make to the effective administration of justice in the substantive and procedural context in which the rule would be applied - "reasonable necessity" seems to be a popular standard in this context: the impact which the proposed power would have on persons subject to it; the importance of the rights thereby affected and the extent to which those rights could be protected by the provisions of an express order by the court; the degree of confidence with which the court can determine where the balance of fairness lies."***

This action has a long and convoluted history. The investors are not parties to it, but they have an interest in its outcome. They have rights which are worthy of protection. If we are satisfied that the protection of those rights can be advanced by an order of the kind sought by Cantrade, and we are satisfied that the balance of fairness tips in favour of making such an order, then in our judgment we have the power, pursuant to our inherent jurisdiction, to make it.

Conclusion

It would not be appropriate for us to make definitive findings on the evidence nor on the merits of the rival contentions which have been advanced by both counsel. Those will be matters for trial. Our function at this stage is to determine whether the protection of investors' interests would be advanced by making the order sought by Cantrade, or a variant of it.

It seems clear to us that the plaintiffs do have a duality of interest. The pleadings show that the action is brought to recover damages not only for the investors but also for themselves. Mr.

Binnington has argued that the plaintiffs have allowed those interests to conflict by failing to convey fairly and dispassionately Cantrade's offer of compensation for the investors. We observe in passing that the nature of the relationship between the plaintiffs and the investors is the subject of contention. Mr. Binnington argues that Mayo held itself out as a trustee and that the relationship is fiduciary in nature. Mr. Sinel's response is that the relationship is not fiduciary but contractual. We do not need to resolve this argument at this stage but it is nonetheless a material consideration in the context of this representation to which we shall return. Whatever the precise nature of the legal relationship between the plaintiffs and the investors may be, it is material for our purposes to examine how Cantrade's offer of compensation was conveyed to the investors. Counsel for the plaintiffs argued that the offer had been properly communicated. According to the evidence of Mr. Marsh every investor was sent a copy of the Daily Telegraph article describing Cantrade's offer on or about 16th January, 1997. The article was sent, it seems, with a bulletin entitled TTS Bulletin No. 16. The bulletin described progress in the litigation and the criminal procedures instituted against Cantrade. There followed a section headed "settlement offer" in the following terms:

> *"SETTLEMENT OFFER*
>
> *To our great surprise, on 10th January 1997, Cantrade issued a public Press Release announcing that they were prepared to reimburse investors' losses. A copy of an article which appeared in many Swiss and UK newspapers is attached (Daily Telegraph 13th January). Whilst we are not permitted to publish copies of correspondence between Plaintiffs and Defendants, we can confirm the broad outlines, viz:*
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> - *investors would be repaid the "trading" losses made by Dr. Young's trading at Cantrade, which the bank estimates at $10.5 million.*
>
> - *interest would be added at a further estimated cost of $2.5 to $4.5 million.*
>
> *Our lawyers have advised us to REJECT this "offer" (see Wall Street journal article and Press Release attached) because of the conditions attached to it, which included a demand that we release to Cantrade the names and addresses of all investors. The "offer" did NOT include any compensation for legal and accountancy bills, nor for time and other costs involved. Additionally, Cantrade's calculations of "trading losses" do not match ours by a long way.*
>
> *We consider this "offer" as Union Bank of Switzerland propaganda at this time but it might be a first step towards a proper negotiated settlement. The criminal fraud charges brought by the Jersey police against Cantrade, their executive P. Stoneman, and others, will probably be heard in court this summer, and it must be sensible for Cantrade to have our civil case settled before they face the criminal Court.*
>
> *We will not accept any offer that allow you, the investors, to be short-changed, and that, in our view, does not offer full compensation."*

It is to be noted that the first sentence conveyed the erroneous impression that the plaintiffs had no prior knowledge of the offer and that the final sentence conveyed the further erroneous impression that the offer was addressed to the plaintiffs.

On 3rd February, 1997, according to the evidence of Mr. Marsh, the investors were sent a copy of an advertisement placed in the Financial Times containing a summary of the offer. That was, it seems, accompanied by TTS Bulletin No. 17. It is unnecessary to cite the entire bulletin. Suffice it to say that in unequivocal terms the investors were told that the offer was inadequate("at least 50% less than it should be") and that its conditions were onerous. The investors were urged to ignore it.

At no stage therefore, on the evidence before us, has Cantrade's offer been conveyed dispassionately to the investors. It may be, of course, that some or all of the investors would not wish to treat with Cantrade. We make no observations upon the adequacy of the offer which is clearly a matter for each individual investor. The investors ought however, in our judgment, to have the opportunity of considering the offer without accompanying rhetoric. It has not been made clear to the investors that their interests and those of the plaintiffs might not coincide. On the contrary in TTS Bulletin No. 17 the investors were told that "your, and our, strength lies in a unified approach". If however, the plaintiffs' arguments as to the nature of their relationship with the investors are upheld, the investors will at the end of the day be unsecured creditors of the plaintiffs so far as the recovery of any damages is concerned. The mounting costs of the litigation and the merits of the opposing arguments in relation to the offer are matters upon which, in our judgment, the investors need advice independent of the advice received from the plaintiffs. We emphasize again that we do not wish to appear to endorse the offer. Its adequacy and the terms and conditions to which it is subject are matters for the investors. In our judgment it is however fair that they should have the opportunity of considering Cantrade's offer dispassionately, of taking advice if they see fit, and of deciding without pressure whether or not to enter negotiations for settlement with Cantrade.

We turn finally to the issue of confidentiality which was urged upon us very strongly by Mr. Sinel. Indeed he submitted that if we were to accede to the request of Cantrade the Island's secrecy laws would be blown apart. We think that the effect would be less dramatic.

Counsel for the plaintiffs was asked by the Court why, if it were the position of the plaintiffs that the offer had already been communicated to the investors, there was objection to the Viscount's doing it again. Mr. Sinel's response was first that the Court had no power to make the order and secondly that the investors did not want their names revealed. We have already dealt with the first objection. So far as the second is concerned counsel relied upon the evidence of Mr. Stott. Mr. Stott's affidavit sworn on 27th November, 1997 exhibited correspondence by standard letter with 73 investors, and concluded that the investors did not want their identities disclosed. The correspondence took the form of an interim report dated 21st July, 1997. It was addressed "to TTS and TTS-F clients (whose identities may not be known to Cantrade)". Under the sub-heading "Publicity" the report stated:

> *"Most investors have advised us that they do not wish their identities revealed, and more importantly that they do not wish their names and addresses published in the international press, or disclosed in such a way as to risk unwelcome publicity."*

Investors were then invited to sign a note addressed to Mayo which declared that they did not wish their identities or addresses disclosed to Cantrade and did not want "any publicity which is likely to result from any such revelation." This is thoroughly misleading and indeed borders upon the mischievous. It is hardly surprising that the majority of investors appear to have replied in the affirmative. In fact the representation does not seek the disclosure of names and addresses to Cantrade. It seeks such disclosure to the Viscount, the executive officer of the Court, or to an

independent third party for a specific purpose, namely the communication to the investors of Cantrade's offer. The representation emphasizes the confidentiality of the communication to the Viscount so that publication in the international press of the names and addresses is hardly likely to result. We reject the suggestion that any material breach of the duty of confidentiality owed by the plaintiffs to their clients is in question. The Viscount will be under a duty to respect the confidentiality of the information passed to him and to utilize it only for the purposes authorized by the Court.

We turn now to consider the precise form of relief which we are prepared to grant. Mr. Sinel argued that the appointment of the Viscount would place him in a partisan role. In part we accept this submission. We do not consider that it would be desirable for the Viscount to be required to give advice to investors or to act as a conduit between them and Cantrade. The order which we are about to make would not have that effect. In terms we order that the Viscount should send, under cover of a letter from him, a letter from Cantrade setting out their offer to the investors. The offer is substantially that contained in the letter of 10th January, 1997 from Mourant du Feu & Jeune to Philip Sinel & Co. although that text will clearly require some amendment. The Cantrade letter should contain no argument but set out the offer in plain terms. To that end the plaintiffs will supply the Viscount in confidence with the names and addresses of the investors, and Cantrade will supply the Viscount with a list of those investors with whom they have been or are in negotiation. The Viscount will send with the offer letter a copy of this judgment, but no other documentation. The Viscount will make it clear to the investors that, if they wish to respond to the offer, they should make contact directly with Cantrade. The Act of the Court which will be settled by the Greffier will set out the detail of the order. There will of course be liberty to apply.

JUDGMENT

(on Plaintiffs' Application for a stay of execution of the Court's Order under Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964, pending determination of an application for leave to appeal, under Article 13(e) of the said Law, which application the Court had refused).

The Court has considered carefully the submissions of both counsel in relation to the application of the plaintiffs for a stay of execution of the Court's Judgment.

It is true that the representation has been outstanding for some time and it is desirable for the reasons given in the Court's Judgment that the investors should have the opportunity of considering Cantrade's offer of compensation at the earliest possible juncture.

On the other hand, refusal of a stay would make any appeal nugatory because the compensation offer would have been dispatched before the appeal could be heard.

We propose therefore to grant the application for a stay, but we adopt the suggestion of Mr. Sinel and it will be limited in time and will expire on 3rd April, 1998. In order to expedite the hearing of the appeal before the Court of Appeal which sits between 30th March and 3rd April, we will make the stay conditional upon the appellants' case and related documents being filed within one month of the appellant receiving from the Judicial Greffier the copy of the transcript. The respondent's case will be filed within one month of receipt of the appellants' case, all with the view to the appeal being heard before the Court of Appeal at its sitting which begins on 30th March.

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Re Lampaert (1990) JLR 290 at 293.

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Langley -v- North West Water Authority [1991] 1 WLR 697.

Roberts -v- Jump Knitwear Ltd [1981] FSR 527.

Martin and the Miles Martin Pen Co Ltd -v- Scrib [1950] 67 RPC 127.

Martin and Biro Swan Ltd -v- Millwood Ltd [1954] 71 RPC 316.

The Consul Corfitzon [1917] AC 550.

Castanho -v- Brown & Root [1981] AC 557.

Riddick -v- Thames Board Mills [1977] All ER CH 677.

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Dockray: "The Inherent Jurisdiction to Regulate Civil Proceedings" (The Law Quarterly Review, Vol. 113, January, 1997 at p.129).

4 Halsbury 37 p.322; para. 14.

Le Geyt: Manuscrits sur la Constitution, Les Lois et les Usages de Jersey Tome 1 (Jersey 1846): de l'Absence: pp.410-412.

Krohn -v- Varna Shipyard (24th July, 1997) Jersey Unreported.

Trollope et au -v- Jackson [1990] JLR 192.

Purdie -v- Bailhache & Bailhache [1989] JLR 111.

Re Tucker [1987-88] JLR 473.

Burke -v- Sogex International Limited [1987-88] JLR 316.

Rumasa SA -v- W & H Trademarks (Jersey) Ltd [1985-88] JLR 308.

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