

87/24.

9th April, 1987.

Before the Deputy Bailiff, assisted by Jurats Coutanche and Le Boutillier.

In the matter of an application by Thomas Joseph Burke to declare the moveable property of Sogex International Limited "en désastre".

DEPUTY BAILIFF: This is a Summons by Sogex International Limited requiring Thomas Joseph Burke to show cause why the sum of one hundred and fifty thousand United States dollars (U.S. \$150,000) paid into Court on the 26th January, 1987, should not be withdrawn with accrued interest, and paid to Sogex International Limited (Sogex) and why Thomas Joseph Burke (Mr Burke) should not pay the respondent company's costs on a full indemnity basis.

It is necessary first to review the history of this matter:-

On Friday the 19th December, 1986, Mr Burke requested the Court to receive his declaration "en désastre" of the moveable property of Sogex. Sogex opposed the application. The Court adjourned the matter for a period of four weeks until the 16th January, 1987.

On Friday the 16th January, 1987, Mr Hamon, for Sogex, produced a draft of an affidavit to be sworn by Mr Samir Daher Hamzah, Chairman of Sogex, paragraph 16 of which read "I also say that S.I.L. (Sogex) is not insolvent and should the honourable Court order that S.I.L. lodge the sum of US \$150,000 with it we shall do so promptly." Mr Hamon also informed the Court that the monies would be paid into Court the Friday following, the 23rd January. He sought one week's adjournment. Mr Begg, for Mr Burke, whose application to the Court to receive his declaration

"en désastre" was supported by sworn affidavits, opposed any adjournment. We do not need to detail the arguments advanced at that time. In the result, the Court granted a further adjournment of one week and, availing itself of the offer made in paragraph 16 of the draft affidavit of Mr Hamzah, ordered that by the following Friday, the 23rd January, 1987, US \$150,000 or the sterling equivalent, be paid into Court - if it were not so paid, Sogex would fail to do so at its own peril. The Court noted Mr Hamon's assurance that the affidavit would be filed within the same delay.

On Friday the 23rd January, 1987, Mr Hamon presented a banker's draft for US \$150,000, although, at first, he sought to recover it and to be released from the undertaking to pay the amount into Court. The courier had not yet arrived with the sworn affidavit. A facsimile of the affidavit as sworn was produced. After lengthy argument, Mr Hamon offered that the US \$150,000 should remain in the Court's hands until further order. Mr Begg persisted in his application for the "désastre". Again, it is unnecessary for us to detail the arguments that were put before the Court. The Court decided that (1) the application for a declaration of a "désastre" would be stayed indefinitely; (2) the banker's draft was to be paid in, in accordance with Mr Hamon's offer, and the money was to remain in the Court's hands until further order; and (3) Mr Burke, if he wished to proceed, should bring an action by means of an Order of Justice for recovery of the US \$150,000 to which Sogex would plead in the usual way.

The banker's draft was duly paid into Court on the 26th January, 1987, and, on the same day, the original affidavit of Mr Hamzah was filed with the Court. It is to be noted that paragraph 16 of the draft affidavit (now re-numbered paragraph 17) was altered quite considerably in the final affidavit as filed, to read:- "It is difficult to understand why T. Burke did not merely commence proceedings on the unpaid cheques and why it was necessary for him to resort to the draconian measure of "désastre" proceedings in the Royal Court of Jersey. It is strongly denied that S.I.L. is insolvent in any way at all and it is for this reason that S.I.L. has lodged the sum of \$150,000 with

that the present proceedings should be raised completely."

We also note that paragraph 15 of the draft affidavit of Mr Hamzah and paragraph 16 of the final affidavit are in almost identical terms which we quote from the letter:- "In view of the above, not only does S.I.L. plan to press charges (we read this as "bring proceedings") against T.Burke, amongst others, for damages done to S.I.L. that far exceed the US \$150,000 that he is claiming but S.I.L. disputes strongly that in the light of subsequent events US \$150,000 is owed to him at all."

Until this week, neither did Mr Burke bring proceedings by means of Order of Justice seeking recovery of US \$150,000 from Sogex, nor did Sogex bring proceedings for damages against Mr Burke.

Instead, by Summons dated the 27th March, 1987, returnable today Sogex seeks to withdraw the sum of US \$150,000 with accrued interest.

The issue of the Summons appears to have galvanised Mr Burke into action and on Tuesday the 6th April, 1987, he obtained the Deputy Bailiff's signature to an Order of Justice claiming US \$150,000 from Sogex. We understand that the Order of Justice has been served.

We have had to consider the effect of the delay. Whilst the delay on the part of Mr Burke in bringing his Order of Justice is regrettable, we do not think that it has been inordinate. Moreover, Sogex has delayed in bringing its intended claim for damages.

This is not an ordinary payment into Court because the money paid in is not available to be taken out by Mr Burke in satisfaction of his claim. It is there by way of security and to negative Mr Burke's allegation that Sogex is insolvent.

Nevertheless, it appears to us to be appropriate to apply similar principles. The Supreme Court Practice 1985 (The White Book) Volume 1, at page 369, paragraph 22/1/18 reports "Peal Furniture Co Ltd versus Adrian Share (Interiors) Ltd" (1977) 2 All E.R. p.211 CA, as follows: "The Court has a complete discretion, to be exercised judicially, whether to allow a payment into Court to be paid out

back to the defendant, and if so, on what terms, and it will do so where, since the date of the notice of payment in, the character of the litigation has entirely changed.

In the instant case, the character of the litigation has not changed. If we were to allow the payment back of the US \$150,000 to Sogex; we would feel bound to lift the indefinite stay of the application to declare a "désastre" and hear that application on its merits. For example, the cheque for the second "tranche" of US \$50,000 was prima facie dishonoured not on the ground that payment had been stopped but on the ground of "insufficient funds". The affidavit evidence does not deal directly with that point and although at an earlier hearing Mr Hamon sought to explain it away, it would be necessary for the Court to receive evidence about it.

We consider that the interests of justice will be best served if the action proceeds on the basis of Mr Burke's Order of Justice, with presumably an answer and counter claim, than on the basis of the stayed application and that the amount paid in should remain in the hands of the Court as security for Mr Burke's claim which is prima facie valid on the basis of the three cheques or "pièces signées".

Accordingly, the summons is dismissed. On the question of costs, the Court recognises, notwithstanding the dismissal of the summons, that Sogex felt it necessary to proceed in this way in default of an Order of Justice from Mr Burke. The decision as to costs should therefore stand over until the final outcome of this litigation.

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Authority referred to in the judgment:-

1. The Supreme Court Practice 1985 (The White Book) Volume 1, p.369, paragraph 22/1/18 - report of Pearl Furniture Co. Ltd, -v- Adrian Share (Interiors) Ltd (1977) 2AER p.211 CA

Other authorities referred to:-

1. Rule 6/26 of the Royal Court Rules, 1982
2. Halsbury (4th edition) - Volume 37: Practice and procedure - section entitled "(8) Payments into and out of Court" - paragraphs 285 to 294 inclusive
3. The Supreme Court Practice 1985 (The White Book) Volume 1 - Order 14
4. Nova (Jersey) Ltd., -v- Kammgarn Spinnerie GmbH (1977) 2AER p.463