11 pages.

24th January, 1991.

IN THE ROYAL COURT OF THE ISLAND OF JERSEY

(Samedi Division)

Before : F.C. Hamon, Esq., Commissioner,
Jura Bonn, Jurat Mrs. Le Ruez.

19.

Between

MICHAEL ROBERT INGLIS SCOWEN
(Suing on behalf of himself and as a Shareholder in the Second Defendant Company)

Plaintiff

And

JILL ROSEMARY SCOWEN
(Neé Le Page)

First Defendant

And

THE EXPATRIATE RESOURCES COMPANY LIMITED

Second Defendant

And

LA MOTTE FORD LIMITED

Third Defendant

Advocate P. C. Sinel for the Plaintiff.
Advocate M. St. J. O'Connell for the Third Defendant.

The summons before us today is a summons by the third defendant to an Order of Justice requesting that the Order of Justice should be struck out in so far as it relates to the third defendant in that it discloses no reasonable cause of action against the third defendant or it is scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the Court. The summons also requests that the interim injunction contained in the Order of Justice should also be struck out on the same grounds.

The application to remove the injunction is supported by an Affidavit sworn by Ronald Peter Welling the Managing Director of the third party.

The facts are clear. The plaintiff at one time was the majority shareholder of a successful company which was registered in 1985 to carry on the business of an employment agency and consultancy. For some time the plaintiff had known the first

defendant and their relationship culminated in marriage in January 1988.

The first defendant eventually acquired a majority shareholding in the company. She holds eight shares. The plaintiff hold seven shares.

The marriage has apparently broken down and there are intimations of divorce proceedings. The first defendant has, according to the Order of Justice, made a "deliberate and systematic withdrawal from the Company's bank account" and the Company is named as the second defendant. Fraudulent accounting is alleged. The matter has been reported to the States of Jersey Police. Full investigations are in train (although the first defendant denies that she has been contacted or interviewed). The first defendant has threatened to dissolve the second defendant. A notice has been served on the plaintiff by the first defendant seeking to remove him as a Director of the first defendant.

The allegations are wide ranging.

The answer of the first defendant was made available to us.

From the pleadings it appears that around the 9th October, 1990 the first defendant represented that she owned a Toyota motor car. (In the answer the first defendant pleads that it was a birthday gift).

The plaintiff alleges that the motor car belongs to the second defendant. His advocate even wrote to the third defendant to say that the second defendant's name appeared on the log book. It now appears that was a mistake and that only the first defendant's name so appears.

The Toyota was, it appears, sold in part exchange for another motor vehicle with a cash adjustment.

The Order of Justice contains an immediate interim injunction restraining the third party, its servants or agents, from selling, transferring or otherwise disposing of the Toyota until the issue of ownership is satisfactorily resolved.

There is also an order in the prayer that the third defendant return "the Toyota" to the second defendant.

Before proceeding further we need to say something about the nature of the injunction obtained. We heard much about 'Mareva' injunction. We do not feel that there is anything appertaining to Mareva injunctions in the subject matter before us. There must be a risk of assets within the jurisdiction being dissipated to bring the case into the Mareva injunction category. No such allegation is made here either in the Order of Justice or in the affidavit.

Let us therefore treat the injunction as a straightforward interlocutory injunction whose purpose is to preserve the status quo

until the rights of the parties have been determined on this action. It is really no more than a "saisie conservatoire".

But what parties are we talking about.

The complaint set out in the Order of Justice is the complaint of the plaintiff. The claim in the Order of Justice is that the Toyota motor car belonged to the second defendant, that is that the Toyota is an asset of the company. Indeed the justification for the injunction is contained with in paragraph 30 of the Order of Justice.

"That further the plaintiff verily believes that unless restrained by order of this honourable Court from so doing, the third defendant will sell, transfer or otherwise dispose of "the Toyota" to the prejudice of the second defendant."

But the second defendant was not a party to the injunction and did not seek to obtain any relief whatsoever.

Indeed, on reading the Order of Justice, we have some difficulty in understanding the nexus between the plaintiff and the third defendant. Paragraph 11 states that the Toyota is owned by the second defendant and then in paragraph 16 that "attempts by the plaintiff to procure the return of the vehicle to the second defendant have to date been to no avail. La Motte Ford Limited (that is, the third defendant) despite now being fully aware of the first defendant's lack of title to the Toyota have stated, through

their advocate in a series of letters dated 24th, 25th and 29th October, copies of which are annexed hereto and marked "MRISB" and "MRISC" and "MRISD" that they have obtained full title to the Toyota, and can dispose of it as they think fit, although they have refused to allow the first defendant to remove the other vehicle which she purportedly purchased from their premises".

We can only wonder if the plaintiff is acting as an agent or even as a guardian angel of the first defendant. Certainly a form of altruism is evident when we read the plaintiff's affidavit where he seeks (at paragraph 12) not only to preserve the second defendant's asset but also "to ensure that the Toyota, being a stolen item was not passed on to an innocent party".

We shall return to the striking out point later but we must consider that Advocate Sinel has commenced the heading of his pleading -

"Michael Robert Inglis Scowen

(suing on behalf of himself and as a shareholder in the

Second Defendant Company) Plaintiff"

The concept is extended in paragraph 13 of Mr. Scowen's affidavit where he says "the second defendant on whose behalf I am pursuing this action, is a successful and profitable company with clients throughout the World".

Mr. Sinel referred us to Order 15 Rule 12 of the Rules of the Supreme Court which, of course, deals with representative proceeding. He mentioned Foss v. Harbottle.

That case merely states that the proper plaintiff in respect of a wrong alleged to have been done to a company is the company and when the alleged wrong is a transaction that might be made binding on the company by a simple majority of members no individual member can sue on it.

Of course there are exceptions to the rule (for instance in cases of illegality or where the act complained of is ultra vires) but we must remind ourselves (although the case was not cited to us by Advocate Sinel) that in Heyting v. Dupont (1964) 2ALL ER 273 at page 275 Russell LJ in holding that the Court may make an exception to the rule in Foss v. Harbottle where the justice of the case demands it said this:-

> "I dare say that the rule in Foss v. Harbottle is a conception as unfamiliar in the Channel Islands as is the Clameur de Haro in the jurisdiction of England and Wales."

It is perhaps unfortunate that Advocate Sinel did not cite that case to us because, in our view, the fact that there are no local precedents means in this case that his preliminary excursion into English law has fallen on to stony ground and on that ground he has stumbled and must fall.

We spent considerable time considering English cases such as Spokes v. Grosvenor and West End Railway Terminus Hotel Company Limited (1897) 2QB 124. Mr. Sinel argued that the proposition of law was contained at page 128 of the judgment where Chitty LJ said:-

> "The action is brought by a shareholder on behalf of himself and other the shareholders in the company. It is founded on an alleged wrong done to the company. For such a wrong the company alone can sue at law, and the general rule is the same in equity. But equity has admitted certain exceptions to the general rule, one of which is that where a fraud is committed by persons commanding a majority of votes the minority can sue by a shareholder."

Mr. Sinel argued that if that is not the law of Jersey we should extend it to Jersey forthwith. He may draw some consolation from the new companies law (which is not yet on the Statute Book) but where the explanatory note says under the heading of unfair prejudice the new law therefore provides that any shareholder who can show that the affairs of a company are being, or have been, conducted in a way that is unfairly prejudicial to him or that anything proposed would be unfairly prejudicial has the right to apply for an order of the Royal Court giving him relief.

These are not representative proceedings under Rule 4/4 of the Rules of Court. Even if application had been made by summons to commence the action by way of representative proceeding we cannot see who the plaintiff would represent. To state baldly that the plaintiff sues on his own behalf "and as a shareholder in the second defendant" is meaningless. The matter does not end there because we cannot see any allegation made against the third defendant by the plaintiff which would entitle the plaintiff to relief.

This Court has said time and time again (see Lablance Ltd. v. Nahda (Investments) Limited (1985-86) JLR N4 and Le Nosh Ltd. v. F. Stirling (formerly Shaw) and others JJ 20th April, 1990 unreported "the party is not to be driven lightly from the public seat of justice except in cases where the cause of action was obviously and almost incontestably bad".

We have every doubt that the plaintiff has a cause of action against the third defendant. It may be that any defect can be cured by amendment. We feel that the case such as it is against the third defendant is extremely weak. We are not prepared to strike the allegation out. We feel that even a scintilla of doubt is sufficient to enable the case to continue. At trial it will be fit for the plaintiff to explain how he can obtain sufficient leverage to prise the Toyota or its value from the third defendant.

We say "or its value" because we are not prepared to allow the injunctions to stand on the basis of what we have already said. We are quite satisfied that damages would be an adequate remedy should the third defendant be liable to the plaintiff.

We have no reason to doubt the affidavit of Ronald Peter Welling the managing director of the third defendant when he says at paragraph 7:-

> "La Motte Ford Limited is a subsidiary of Soubriquet Limited which has been trading in the motor business for more than 60 years in this Island. As a group of companies, we own realty and stock worth millions of pounds in this Island and we enjoy a substantial turnover."

Whether or not the third defendant can give good title is not for us to assess at this preliminary hearing.

We therefore order that the interim injunction contained in the Order of Justice signed by the learned Bailiff on the 2nd November, 1990 shall be struck out.

Costs shall be in the cause.

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