

ROYAL COURT
(Samedi Division)

50.

5th April, 1993

Before: The Bailiff, and
Jurats Blampied and Hamon

<u>Between:</u>	Preussag Anlagenbau G.m.b.H.	<u>Plaintiff</u>
<u>And:</u>	Thomas Joseph Burke	<u>Defendant</u>
<u>And:</u>	The Judicial Greffier	<u>First Party Cited</u>
<u>And:</u>	Andrew Philip Begg	<u>Second Party Cited</u>
<u>And:</u>	Thomas Joseph Burke	<u>Intervenor</u>

Applications:

- (1) by the Intervenor for Orders:
 - (a) striking out the Order of Justice;
 - (b) or in the alternative, raising or varying the Injunctions set out therein to permit the First Party Cited to pay to the Second Party Cited, and the Second Party Cited to pay to the Intervenor the balance of US\$150,000 paid into Court by Sogex International Limited in an action between the Intervenor and Sogex International Limited in respect of the Intervenor's claims against the said company; and
- (2) by the Plaintiff for an Order releasing to the Plaintiff the said balance of US\$150,000 paid into Court by Sogex International Limited, in order to satisfy a Judgment granted to the Plaintiff on 21st December, 1990, in an action between the Plaintiff and the said Sogex International Limited.

Advocate A.P. Begg for the Intervenor.
Advocate R.A. Falle for the Plaintiff.

JUDGMENT

THE BAILIFF: The background to the matter we have to deal with today goes back as far as 1986.

On 19th December, 1986, Mr. Thomas Joseph Burke applied to this Court to declare the moveable property of Sogex International Limited 'en désastre'. A number of matters were discussed at that hearing, but it was put off until a later date and the Court (according to the Greffier's note) ordered Sogex to pay into Court by 23rd January, 1987, US\$150,000, or the sterling equivalent, and the Court noted on that occasion that Sogex was going to file an affidavit.

On 23rd January, 1987, an affidavit was produced in the form of a "fax" and a draft for US\$150,000 payable to the order of the Judicial Greffier was produced.

The Greffier's note shows that the application to declare Sogex International 'en désastre' was stayed until further order and the Court indicated that Mr. Burke should institute an action against Sogex International in respect of such claims as he might have. The Greffier's note reads: "US\$150,000 paid into Court by Sogex to remain so until further order".

Eventually Mr. Burke sued Sogex International. On 16th January, 1987, when Mr. Hamon appeared for Sogex International, the Deputy Bailiff said this (and I read from the transcript of his remarks):

"The Court has read the unsworn draft affidavit of Mr. Samir Daher Hamzah, dated 15th January, 1987, and avails itself of the offer made in paragraph 16 thereof inviting the Court to order that Sogex International Limited lodge with the Court the sum of US\$150,000. So we order that by next Friday, the 23rd January, 1987, US\$150,000 or the sterling equivalent will be paid into Court and if it is not Sogex International fails at its own peril".

The amount was in fact paid in on 26th January, 1987. After Mr. Burke had brought his substantive action against the company Sogex International Limited, there was an application made by that company on 9th April, 1987, for the money to be released. On that day the Deputy Bailiff, who was presiding, gave a very full résumé of the background in slightly more detail than I have thought it necessary to do this afternoon. He makes some comment on p.2 of his Judgment about the money, where he said that on Friday, 23rd January, 1987, the date I have already mentioned on which the draft was presented for US\$150,000, there was some lengthy argument. The Court decided, he said, that **"(1) The application for the declaration of a désastre would be stayed indefinitely; (2) The banker's draft was to be paid 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".

According to the Order of Justice which was eventually filed, three cheques payable to Mr. Burke had been referred to drawer for various reasons.

In relation to the money paid to the Greffier - I avoid using the words 'payment in' deliberately - on p.3 of the Judgment the learned Deputy Bailiff says this in the penultimate paragraph:

"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".

That could not be clearer. On the following page the Deputy Bailiff says this:

"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..." (which, as I have said, had by then been served) **"with presumably an answer and counterclaim 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'."**

The Deputy Bailiff dismissed the application for the money to be paid back to Sogex. It is quite true that in the second paragraph I have read the learned Deputy Bailiff used the words **"as security for Mr. Burke's claim"** but that read in conjunction with the earlier passage is merely using the word "security" in a wide and perhaps in that context a slightly - and I say this as no criticism - imprecise way but no more.

The next matter which came before the Court in chronological order is the hearing before Commissioner Le Cras on 3rd November, 1987, on an application by Mr. Burke to strike out the answer and counterclaim of Sogex. That application was refused by the Commissioner.

On 30th August, 1988, I sat as a Single Judge of the Court of Appeal to consider an application by the respondent, Sogex International, that the appellant, Mr. Burke, who was appealing against Commissioner Le Cras' Judgment, should furnish security for the costs of the appeal. At that hearing, I referred to the US\$150,000 as follows on p.2 of the Judgment:

"In this particular case the sum of US\$150,000 has already been paid into Court by the Defendant but not in the ordinary

way. The payment into Court arose out of an attempted 'declaration en désastre' by the plaintiff against the defendant. At a preliminary hearing before the Royal Court on 9th April, 1987, that Court dealt with the question of whether Sogex International Limited should be declared 'en désastre'. I cannot read that Judgment as in any way supporting the suggestion of Mr. Michel for the Respondent today that the US\$150,000 was paid into Court as a token of goodwill; it was not. It was ordered by the Court and, after a great deal of difficulty, the money was paid in and the Court ordered that it remain in Court as a kind of pledge against the risk of Sogex being declared 'en désastre'. Perhaps the effect will be that it will be available should the Plaintiff succeed. Thus it is neither a payment into Court in the ordinary accepted way, nor is it a payment into Court in the way in which Mr. Michel has argued today".

There again, there was some doubt in my mind at that time as to exactly what that payment was, but I appear to have been satisfied that it was not an ordinary payment into Court in accordance with the usual Rules governing payments into Court which in fact are Rules 6/26(1) & (5) of the Royal Court Rules, 1982, 6/26(1) reads:

"(1) In any action before the Court any defendant may at any time pay into Court a sum of money in satisfaction of the cause or causes of action in respect of which a claim is made".

And sub-paragraph (5):

"(5) Except where the tender of payment is pleaded by the party making payment, the fact that payment into Court has been made shall not be disclosed to the Court before whom the action is tried until all questions of liability and of the amount of debt or damages have been decided".

There are clear instructions in that Rule as to exactly what a payment into Court is and what could be the consequences of such a payment within that Rule.

Subsequently on 21st December, 1990, Preussag Anlagenbau GmbH obtained a Judgment by default from the Royal Court against Sogex International - but nonetheless it was a Judgment. Sometime later Mr. Falle, acting for the plaintiff, tried to put that Judgment into effect. He was notified by the Viscount of the payment into Court of the US\$150,000 (and I use those words in the widest possible sense). Mr. Falle then brought a representation asking that, because of his client's prior Judgment, the Court should order that those funds be released to Preussag Anlagenbau GmbH.

On 4th September, 1992, Mr. Burke who was a party cited in that representation pleaded to it and on 15th September, 1992, the representation was set down for hearing and adjourned for a date.

On 30th September, 1992, the Court of Appeal heard the appeal from Commissioner Le Cras' Judgment and made an Order amongst which it ordered that the US\$150,000 should be released to Mr. Burke.

At that Court of Appeal hearing the respondent, Sogex International, was not heard because it had by that time abandoned its part in that case, but the Act of the Court of Appeal of 30th September, 1992, is interesting because the Court says:

"The respondent's advocate, having by letter dated 20th September, 1992, notified the Court that he no longer represented the respondent and the respondent not having appeared, the court indicated to the appellant that it wished to be addressed by the appellant on the merits of his appeal".

And therefore it is clear to this Court that the Court of Appeal had before it counsel for Mr. Burke (who was Mr. Begg who has appeared before us today) and that he submitted the facts and legal authorities asking the Court to rule in his client's favour.

We are sitting today not only to deal with the representation of Preussag Anlagenbau GmbH, but also with a summons which Mr. Burke has issued asking us to dismiss an Order of Justice which Mr. Falle took out after the Judgment of the Court of Appeal injuncting the Judicial Greffier from paying over the US\$150,000.

The difficulty we face today must be apparent to all parties, as it certainly is to the Court: we have a Court of Appeal Judgment; this Court cannot overturn or interfere with that Judgment. It is a matter for the Court of Appeal alone, depending on the view it takes as to its powers if we were to find that, at its hearing, certain matters were not put to it which should have been.

If one looks at the judgment of the Court of Appeal we see that the only reference to the 'désastre' proceedings and the US\$150,000 occurs in a short paragraph, the second paragraph on the first page of the Judgment. All it says is this:

"This followed ..." (that is to say following the Order of Justice of Mr. Burke himself) "an application to have the defendants declared "en désastre", which proceedings were stayed on the payment into Court by the defendants of \$150,000, which payment was effected on the 26th January, 1987".

There could be some confusion in the mind of the Court of Appeal inasmuch as they appear to have regarded the payment into Court in the 'désastre' proceedings as the same as a payment into Court, *inter partes*, made in the ordinary way.

We have before us a transcript of a short exchange between the Court and Mr. Begg which followed delivery of the Judgment. On the second page of the transcript, we read this passage:

MR. BEGG: "I would ask for the answer and counterclaim to be struck out, Sir. Judgment awarded for the plaintiff in terms of the original Order of Justice. The Notice of Appeal, Sir, asks for an order for costs here".

THE PRESIDENT: "And, payment out of the money in Court".

ADVOCATE BEGG: "And, I would ask for payment out of the \$150,000 paid in on the 26th January".

THE PRESIDENT: "And costs"?

ADVOCATE BEGG: "And, costs here"

THE PRESIDENT: "And then there was a security for costs"?

ADVOCATE BEGG: "There was security for costs, Sir, so I would obviously ask for that to be paid back to Mr. Burke".

(I interpolate here, that was in fact the Order that I made on 30th August, 1988, before the matter went to the Court of Appeal). "And, the other matter, Sir, the other part of the Order of Justice, the \$150,000 paid in on the 26th January, 1987, obviously covers. I would ask for obviously my client to be entitled to the interest accrued thereon as must be right".

We are informed that, as appears from the Order itself and from the words used by the President, Mr. Begg drew up the Order which he was seeking and under which, as I have said, the Court of Appeal ordered the Judicial Greffier to release \$150,000 to Mr. Burke.

Mr. Falle has attacked that Judgment and has said that Mr. Begg failed to inform the Court of Appeal as he should have done, of the detailed background and particularly of the fact that the money held by the Greffier could be interpreted not as an ordinary payment into Court but as something special as the Deputy Bailiff and I have interpreted it. Therefore, the ordinary Rules might not apply. In the opinion of this Court that was something which Mr. Begg ought to have done. There is an overwhelming duty on every counsel upon whom the Court has to rely for guidance and direction on the authorities, to put everything before the Court, whether it is in favour of his client, or against his client. Failure to do so destroys that trust between the Bench and Bar which is so essential to the proper administration of justice.

In our opinion the essential issue is: what was the money which the Greffier received by Banker's draft in January, 1987.

We have no doubt it was a form of pledge put forward by Sogex International Limited to satisfy the Royal Court that it was a company of some substance and that therefore there should not be a "*déclaration en désastre*". It was paid into Court for that purpose alone. It was not in respect of a claim by Mr. Burke set out in a subsequent Order of Justice to which there was an answer and a counterclaim; it was purely to do with the law dealing with a "*déclaration en désastre*". It was effected for a totally different purpose from an ordinary payment into Court, and we cannot find that in some mysterious way, it changed its character. It may have appeared to the Court of Appeal that it was an ordinary payment into Court; if so that impression, we have no doubt, can be laid firmly at the door of Mr. Begg for not having drawn the Court's full attention to all the matters which were germane to the consideration of the appeal.

Accordingly, we are going to make the following Order, but before doing so Counsel will realise that this Court is in a difficult position. Having found as we have, we have no power to change the Judgment of the Court of Appeal and of course it would be wrong for us to order that the injunctions continue because there is a decision of the Court of Appeal which conflicts with those injunctions.

Accordingly we are going to refer the matter back to the Court of Appeal with a question for them. The question is this: is the Court of Appeal able to review its Judgment once the Act of the Court has been made, where it is satisfied that there has been a material non-disclosure or the making of misleading statements made to it during the course of the hearing? In view of that, we are going to dismiss the summons. The injunctions will continue until further Order of this Court and it is worth noting at this stage that the Orders of the Royal Court in January and April, 1987, were that the money would remain with the Greffier until further Order of this Court, not of the Court of Appeal, and that is another point which would have to be considered in due course.

As far as costs are concerned, we think they should be left over pending the decision of the Court of Appeal.

Authorities

- R.S.C. (1993 Ed'n) Vol. 1:
O.22/1/22: "Bankruptcy of defendant after payment into Court";
O.29/1/23: "Conduct of action after grant of Mareva Injunction".
- Royal Court Rules, 1982, as amended: Rule 6/26, 28.
- Re: Keyworth ex parte Banner (1874) L.R. 9 Ch. App. 379.
- Re: Gordon (1897) 2 Q.B. 516.
- Re: Ford (1900) 2 Q.B. 211.
- Peal Furniture Co. Ltd. -v- Adrian Share (Interiors) Limited (1977) 2 All E.R. 211.
- W.A. Sherratt Ltd. -v- John Bromley (Church Stretton) Ltd. (1985) 1 All E.R. 216.
- R.N. Ough: "The Mareva Injunction and Anton Piller Order" (1987):
"Practice and Precedents":
Section 2.8: "Limitations on the scope of the Mareva";
Section 2.10: "The maximum sum proviso".
Section 5.7: "The undertaking to serve";
p.p.124-125: "Precedent of combined Mareva/Anton Piller Order".
- Middle East Engineering Ltd. -v- Edwards (1980) J.J. 265.
- Johnson Mathey Bankers Limited -v- Arya Holdings Limited and Another (1985-86) J.L.R. 208.
- Abbott Industries Incorporated -v- Warner & Others (1985-86) J.L.R. 375.
- Rasu Maritima S.A. -v- Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as intervenors) (1977) 3 All E.R. 324.
- Galaxia Maritime S.A. -v- Mineralimportexport, The Eleftherios (1982) 1 All E.R. 796.
- Z. Ltd. -v- A. and Others (1982) 1 All E.R. 556.
- The Siskina (1977) 3 All E.R. 803.
- Ninemia Corporation -v- Trave Schiffahrts (1984) 1 All E.R. 398.

Cooley -v- Wood (7th October, 1991) Jersey Unreported.