

ROYAL COURT
(Samedi Division)

168A.

23rd September, 1996.

P.R. Le Cras, Esq., Lieutenant Bailiff,
sitting in Chambers.

Between:	Pacific Investments Limited	Plaintiff
And:	Robert Christensen	First Defendant
And:	Alison Mary Holland	Second Defendant
And:	Michael Allardice	Third Defendant
And:	Graeme Elliott	Fourth Defendant
And:	Firmandale Investments Limited	Fifth Defendant
And:	James Hardie Industries Limited	Sixth Defendant
And:	James Hardie Finance Limited	Seventh Defendant
And:	Govett American Endeavour Fund Limited	Eighth Defendant

Re the Application of the First, Second, Third, Fourth and Fifth Defendants to strike out and/or stay the Plaintiff's Order of Justice.

Application of the Plaintiff:

- (1) to adjourn the hearing of the said Defendants' Application; and
- (2) for the Court's directions as to whether two written submissions by the said Defendants in support of their Application regarding (a) an abuse of the Court process, and (b) the principle established in *Smith -v- Croft* (1986) 1 WLR 580, (1986) 2 All ER 551 should be heard separately.

Advocate N.F. Journeaux for the Plaintiff.

Advocate W.J. Bailhache for the First, Second,
Third and Fourth and Eighth Defendants.
Advocate A.D. Hoy for the Fifth Defendant.

JUDGMENT

5 THE LIEUTENANT BAILIFF: There are two summonses before the Court. One is that the bid dates of 7th October, 1996, obtained by the First to the Fourth and the Fifth Defendants be vacated, and the other the resumption of the adjourned summons by the Plaintiff for specific discovery against the First to the Fourth and the Eighth Defendants.

10 This latter summons was adjourned by the Court until the First to the Fourth and the Fifth Defendants (the Defendants) had decided on what grounds their application to strike out should be brought.

15 They have now decided this, and have prepared their skeleton argument showing that they wish to proceed both on the grounds that the action brought by the Plaintiff is an abuse of process (and this whether it is a derivative action or one brought under s.141 of the Companies (Jersey) Law, 1991) to which they have now attached a submission as to champerty, and also on the grounds that the Extraordinary General Meeting of 4th September, 1995, sufficiently ratified the actions of the directors (the Smith -v- Croft (1986) 1 WLR 580, (1986) 2 All ER 551 point).

20 This would, in the ordinary way, mean that the summons for specific discovery would now come on. There is, however, a complication with this: with the hearing date so close, the Defendants propose to defer the Smith -v- Croft argument. This is opposed by the Plaintiff who claims that if both legs are to proceed they should proceed together. Apart from anything else, if the Plaintiff's succeed on this point then there would be no chance of the hearing date being kept.

30 In those circumstances it seemed to the Court that the best way to proceed was first to decide whether the two grounds of the strike out application should be split as desired by the Defendants, or whether they should both be adjudicated by the Court at the same hearing, as was the contention of the Plaintiff.

35 As a secondary point, the Plaintiff maintained that even if the Court did permit the Defendants to proceed at this stage on the one ground alone, it would in any event take more than the five days allotted.

40 The original application to strike out was on the grounds of abuse of process. At or shortly before the hearing arranged for it, the Defendants requested an adjournment in order to test the views of the majority of the minority shareholders at an Extraordinary General Meeting. This adjournment was duly granted, a circular was prepared and sent and the majority of the minority shareholders supported the Defendants. The Defendants duly proceeded with their application to strike out, this being delayed by various summonses, not least for
45 discovery.

Last month, on 28th August, 1996, the Plaintiff applied for a stay, which was opposed by the Defendants and refused by the Court on 29th August, 1996.

5 Subsequent to that, the Plaintiff brought various summonses to Court, and one in particular, in which they were successful, for the cross-examination of Mr. Christensen has opened up a whole new perspective with regard to the leg based upon the Extraordinary General Meeting (the Smith -v- Croft point). The Defendants have been given
10 leave to appeal against that particular order, and another one concerning the documents to be produced by Mr. Moore.

15 It is in these circumstances that the Defendants wish to defer that leg, whilst reserving their rights, and in effect proceed on the basis which was available to them prior to the adjournment in August, 1995. It is this course which is opposed by the Plaintiff who contends that both legs should be heard together, and who wishes in any event to proceed with his outstanding summons for specific discovery.

20 It seems to the Court that the general rule is that which was expressed in terms in Todman -v- Black (1980) JJ 255 CofA., namely that unless there is good reason to the contrary, all the issues should be tried together. This was considered more recently in Enhörning -v- Nordic Link Ltd & Ors. (12th April, 1996) Jersey Unreported, where the
25 Greffier had found that it would be difficult to isolate the one issue, as sought by the Defendant: The Greffier's view was confirmed by the Court at p.5:

30 *"The general rule is quite clear viz. that in the ordinary way, all issues should be tried together.*

35 *There are, in the view of the Court, no exceptional circumstances or special grounds for making an order for the hearing of a preliminary issue as is sought in this case. It is more than difficult to see how the proposed preliminary issue can be separated and, indeed, in the view of the Court any attempt to do so will cause unnecessary delay and expense. Although the anxiety of the Defendants is appreciated it is in the interests of justice that these proceedings should advance as expeditiously as possible, and the way to do this is by
40 having one trial. The Judicial Greffier has gone very carefully into the arguments and the law. Nothing has been put to the Court today which invalidates his reasoning and his order, with both of which the Court concurs. The appeal is
45 therefore dismissed".*

50 The Plaintiff took the view that the two legs - if one may call them that - of the strike out application should not be split. In his submission the issues are not isolated. Mr. Christensen has deposed extensively in his affidavits on the first leg, that of abuse of process.

55 In Mr. Journeaux's view, the Judge sitting on the application to strike out will have to make an enquiry into the merits of the Plaintiff's case. Although this is contested by the Defendants, his submission is that the question of whether there is an abuse of the process depends on whether the Plaintiff acted in bad faith. Whether

the case falls, for instance, within the parameters of Broxton -v- McClelland & Anor. (25th January, 1995) Unreported Judgment of the Court of Appeal of England cannot here be decided without consideration of the Plaintiff's reasons and, as a converse, whether the behaviour of the Defendants provided a proper ground on which to take action.

For the action to be struck out, it must be beyond the proper scope of the action, and there would have to be an ulterior motive in that it was "seeking a collateral advantage for [it] self beyond what the law offered as a remedy for its grievance" (see the headnote in Goldsmith -v- Spearings (1977) 2 All ER 566).

As to the extent of the cross-examination, the Court ought not to shut out that which, discovered subsequently, confirms Mr. Moore's view. Further, (see Phipson on Evidence (14th Ed'n) p.245 12-12) the Court, subject to relevance, ought not to restrict the scope of the cross-examination. If the *bona fides* of Mr. Moore are questioned, then the evidence of Mr. Christensen going to the Defendants' case makes him liable to cross-examination, not least on the question of who controls him. He denies using his position wrongly. The Plaintiff will wish to test that. The Defendants must be able to defend themselves properly and fairly. Further, it is the Plaintiff's submission that the circular put out by the Board for the Extraordinary General Meeting was misleading. The Plaintiff is entitled to test the information in the circular. This was not independently prepared (see for example the Prudential Assurance Co. Ltd. -v- Newman Industries Ltd (No. 2) (1982) 1 All ER 354) and the Plaintiff must be allowed to adduce evidence showing that the Board knew that the circular was inaccurate and misleading. This again will test the *bona fides* of Mr. Christensen.

Once the credit and the motives of Mr. Christensen or Mr. Moore are raised in the one, there must be an overlap; and in terms, given this approach, the two legs ought to be taken together (see Enhörning -v- Nordic Link Ltd & Ors (20th February, 1996) Jersey Unreported).

Last, in his submission, there would be a risk if the abuse point were heard first that, if for example, the Plaintiff might win on the first and win (or lose) on the second leg, the Court of Appeal would be faced with two appeals, two transcripts and two findings of fact which will overlap and on which two different Courts might have come to two different conclusions on overlapping evidence. He further remarked that if the whole goes forward as one, discovery is still being sought.

As to the question of deferring the date if the Court ordered the legs to be taken separately he submitted that five days would not be nearly long enough to complete the ground of abuse of process.

There were the cross-examinations of Mr. Christensen and Mr. Moore which with re-examination would take more than the five days alone. An allegation of champerty had been raised. The point would require serious examination of a number of authorities and the submissions on law and fact would equally probably extend to several days. He added that it was general for counsel to under-estimate the time required.

Mr. Bailhache for the Defendants argued, with his customary eloquence, strongly for the opposite view.

5 In his submission there was considerable merit in splitting the
legs as, if his clients were successful on the abuse of process
point, that would bring proceedings to a summary end. The Defendants
had treated the proceedings as being both derivative and brought
10 under s.141 of the Companies (Jersey) Law. As to the derivative
proceedings the question was: ought the Plaintiff to be allowed to
bring proceedings in the name of the company? The Plaintiff was
merely the alter ego of the Govett Group and the Court ought not to
allow Govett to bring the action thus to aggravate the Defendants.

15 It did not matter whether James Hardie controlled Firmandale or
the fund, the question is simply whether the Plaintiff be permitted
to bring the action.

20 It is, on this point, the links with Govett which matter and in
considering this the Court will need to consider the question of
whether this action is being used for purposes of oppression.

25 The Court does not need to look at the merits of the underlying
case and, for the purposes of the application to strike out, it is
immaterial whether the allegations in the Order of Justice are true,
as the real question is whether the Plaintiff ought to be permitted
to proceed. Nothing in Mr. Christensen's cross-examination would be
relevant to the links with Govett, and the question is whether the
30 Plaintiff should get to trial. In his submission five days would be
more than enough. The Court would not allow Mr. Journeaux to go into
a full hearing to establish whether he can bring the Order of
Justice. If the Court thinks that the questions put by the Plaintiff
are relevant, then it should not hear them but send the case for
trial.

35 All the Defendants would be asking at the hearing is whether
the collusion is objectionable and whether a collateral purpose is
established. In his submission, the trial Judge must find the
40 Plaintiff's attempt to widen the trial to be irrelevant and if the
Court is worried, then, as he had previously said, it should send the
case to trial.

45 In his view Prudential dealt with the question of whether the
Plaintiff should have the right to bring the action and thus the
question was whether there should be a hearing not a hearing itself.

50 As regards the question of collateral purpose it is necessary
to go back to the position as it was at the time the proceedings were
brought and Mr. Christensen's evidence does not affect the reason as
to why proceedings were brought.

55 The Court's only duty is to see whether the action should
proceed. It is because of the links with Govett that it cannot
continue. He conceded, quite properly, that what he suggested as the
appropriate course now was the position which the Defendants had
reached in August, 1995. It was thought then and not unreasonably (a
view with which the Court had concurred) that the holding of the

Extraordinary General Meeting might bring a summary end to the litigation. This view had had, of necessity, to be revised once the Court had ordered the production of Mr. Christensen for cross-examination.

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The Defendants had appealed against that finding. If Mr. Christensen gave evidence on the abuse of process point, that would not, he considered, affect the second point as in his view they were discrete and his appeal could still come on. If the cross-examination were widened then he might seek an adjournment.

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So far as the appeal as to the documents to be produced by Mr. Moore was concerned, then if he could proceed immediately he would do so on the basis of what is permitted. His clients had been delayed throughout. This was an instrument of oppression designed to assist in other proceedings and he should be allowed to go forward now.

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The Court appreciates that if the Defendants succeed in narrowing the first leg, i.e. the abuse of process as they wish, then this may bring the proceedings to an end (subject of course to appeal).

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However, the Court here is engaged in a balancing exercise, and is mindful of the fact that it is not itself engaged in deciding the application. One of the factors which the Court must consider is the position which might arise were the Court which hears the application to follow the view advocated by the Plaintiff as to the evidence.

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It will be for the trial Judge to decide what evidence he lets in and how far he will hear evidence. Whether he restricts the evidence or lets it in as proposed by the Plaintiff there is the near certainty of an appeal. Presumably the second leg is to remain dormant pending the outcome.

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One of the questions which, as it appears to the Court, will fall to be decided by the trial Judge is whether the establishment of a collateral purpose is sufficient, or whether there is a case to be argued that the Plaintiff acted properly.

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If evidence is heard to establish this, as suggested by the Plaintiff, and the Court ought not to close down this avenue at this stage, or to permit proceedings to go forward if such a course were to lead to an application for an adjournment then it seems to the Court that there is a near certainty of an overlap between the two legs; with the possible consequences outlined by Mr. Journeaux.

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In the view of the Court, there should be one hearing to dispose of the whole application to strike out when the grounds, if there are more than one, should be taken together and one decision made. There is no justification as the Court sees it, for the grounds to be divided and brought separately.

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So far as the ground of abuse of process is concerned if the Defendants proceed with this as the only ground, which they have shown no desire to do, then there is no question but that five days is too short a time and the hearing date for the 7th October must be abandoned.

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5 The Court wishes to add that the pressure on the Courts is such that if cases run on beyond the time allocated, either other cases which may have been waiting will very likely have to be deferred, or the hearing itself, as has happened in the past, may have to be adjourned for weeks or months. If the abuse point is taken by itself then ten days ought to be allocated; if, as the Court now orders, both legs be taken together, then fifteen days would seem to be a reasonable estimate.

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Authorities

Enhörning -v- Nordic Link Ltd. & Ors. (20th February, 1996) Jersey
Unreported.

Enhörning -v- Nordic Link Ltd. & Ors. (12th April, 1996) Jersey
Unreported.

Bamford -v- Bamford [1969] 1 All ER.

Prudential Assurance Co. Ltd. -v- Newman Industries Ltd. (No. 2) (1982)
1 All ER 354.

Goldsmith -v- Spearings (1977) 2 All ER 566.

Ashmore -v- Corporation of Lloyds (1992) 2 All ER 486.

Pacific Investments Ltd -v- Christensen (30th January, 1996) Jersey
Unreported.

Phipson on Evidence (14th Ed'n): pp. 245-254, 263-270.

Broxton -v- McLelland (30th January, 1995) Unreported Judgment of the
Court of Appeal of England.

Todman -v- Black (1980) JJ 255 CofA.