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ROYAL COURT

5th September, 1990

127.

Before the Judicial Greffier

BETWEEN	Mark Bowen and	
	Loretta Crocker, his wife	PLAINTIFFS
AND	Noel Investments Limited	DEFENDANT

Summons before the Judicial Greffier to strike out an action commenced by Ordre Provisoire on the grounds that the action was otherwise an abuse of the process of the Court under Rule 6/13(d) of the Royal Court Rules, 1982, as amended.

Advocate C.M.B. Thacker for the Defendant
Advocate P.C. Harris for the Plaintiff

JUDGMENT

JUDICIAL GREFFIER: On the 31st August, 1989, the Plaintiffs obtained an Ordre Provisoire from the Bailiff upon the basis of a cheque issued to them for the sum of £8,850.00 dated 26th May, 1989. The cheque at that time had written at the top left hand side the words "stop cheque".

On 1st September, 1989 the Viscount arrested shares numbers 5,801 to 6,000, inclusive, in the limited liability company known as "Betticlos Properties Limited", and this in accordance with the Ordre Provisoire. The action came before the Royal Court on 8th September, 1989 and was placed on the pending list. The Plaintiffs did not subsequently file particulars of claim but despite this on 18th September, 1989 the Defendant filed an answer.

Paragraph one of the answer stated, "That the action in respect of the cheque in the sum of £8,850.00 is wrongly instituted by way of an Ordre Provisoire in that the said cheque had been countermanded by the Defendant and as a consequence, does not constitute a pièce signée on which an Ordre Provisoire can be based. The said claim should be commenced either by way of an Order of Justice, or alternatively, by simple summons."

On May 18th, 1990 the Plaintiffs served an Order of Justice, dated May 17th, 1990, on the Defendant which Order of Justice related to the same claim for £8,850.00.

The summons before me, at the hearing on 21st August, 1990, was a summons to show cause why in accordance with Rule 6/13(d) of the Royal Court Rules, 1982, the action should not be struck out on the ground that it is an abuse of the process of the Court.

The wording of the summons is not strictly in accordance with Rule 6/13(d) which sets out a ground for striking out of "it is otherwise an abuse of the process of the Court". That part of the Rule implies that sections (a), (b) and (c) or parts thereof constitute an abuse of the process of the Court and that sub-paragraph (d) is meant to deal with cases of abuse of the process of the Court which fall outside of (a), (b) and (c).

Both parties referred me to the terms of Order 18 Rule 19 of the Rules of the Supreme Court 1965 which are in very similar but not identical terms to Rule 6/13 of the Royal Court Rules. The core of the Defendant's case for striking out is as follows:-

- (a) that the basis upon which the Ordre Provisoire was obtained was that the cheque was a Pièce Signée;
- (b) that, on May 12th, 1980, the Court of Appeal in the case of Field Aircraft Services (Exeter) Limited -v- Kenton Utilities and Developments Limited, International Air Charter Limited and Haddican, (which case is reported on page 78 of The Jersey Law Reports for 1987 and 1988), had adjudged that a countermanded cheque could not constitute a Pièce Signée as it had been countermanded and consequently was not the admission of a debt;
- (c) that, therefore, the Ordre Provisoire had been wrongly obtained and that this was an abuse of the process of the Court.

The Defendant's advocate, Advocate Thacker, presented a secondary argument to the effect that the Plaintiffs had now two actions before the Court in relation to the same matter and that this also constituted an abuse of the process of the Court. Advocate Thacker's argument was that once the second action had been commenced, the first action should not be allowed to continue and should therefore be struck out. Advocate Thacker also pointed to the fact that a statement of claim had not been filed by the Plaintiffs and that the Plaintiffs had not taken any action in relation to the first action since the matter was placed on the pending list.

Advocate Harris on the other hand contended that the two actions should be consolidated rather than the first action struck out. He did not concede that the cheque was not a Pièce Signée and attempted to distinguish the Field Aircraft case on the following grounds:-

- (a) Firstly, upon the basis that that case related to the lifting of injunctions rather than to the matter of an Ordre Provisoire.
- (b) Secondly, upon the basis that in the Field Aircraft Judgment there was a clear dispute whereas in this case there was no reasonable dispute.

He also indicated that his clients had never been pressed to file a statement of claim. He contended further that the Plaintiffs would have been entitled to seek an Ordre Provisoire upon the basis of a claim for a liquidated sum.

He also contended that in order for an abuse of the process of the Court to have occurred it was necessary for the Defendant to show that the Plaintiff was not acting bona fide and therefore that there was some wrong intent.

The issuing of an Ordre Provisoire by way of arrêt in the Royal Court is mainly a matter of common law. There are three main categories as follows:-

- (a) actions for the payment of rental;
- (b) actions on a Pièce Signée; and
- (c) actions for a liquidated sum on an account rendered.

However, Article 1 of the Loi (1813) concernant le paiement de lettres de change, etc., relates to the second category and states as follows:-

Article 1

"Toutes lettres de change dûment acceptées, et tous billets à ordre, seront payables le jour de leur échéance, y compris trois jours de grâce; et dans le case de refus ou de défaut de payement de la part des débiteurs, il sera loisible aux personnes ayant droit de demander le payement de telles lettres de change ou billets à ordres de faire saisir, par le moyen d'un Officier de Justice, les biens ou la personne de tels débiteurs, quoiqu'ils soient fondés en héritage et de procéder vers eux sommairement tant en vacance qu'en terme."

It is clear that a cheque is a bill of exchange drawn on a bank. It is also clear that the normal translation of "lettres de change" is bills of exchange. Accordingly, the 1813 Law appears to be authority for the statement that the holder of a cheque may obtain an arrêt by means of an Ordre Provisoire for the payment of the cheque.

I have also considered the case of Bolt and 25 others (trading as Chestertons) -v- Leisure Enterprises (Jersey) Limited which is reported on page 271 of the Jersey Law Reports for 1985 and 1986. In this Judgment on page 273 Sir Peter Crill, then the Deputy Bailiff, considered the effect of Article 1 of the 1813 Law and held that it applies to the payment of a countermanded cheque. Surprisingly, in the context of this application, that action related to an application by the Plaintiff to strike out the defence upon the basis that apart from in exceptional circumstances, no answer could be put in to an action on a dishonoured cheque. The application under Rule 6/13(a) in that case was dismissed. Although, that action was not commenced by an arrêt it is important in relation to the countermanded cheque.

In the case of Burke -v- Sogex International Limited, Jersey Law Reports 1987-1988 at page 316, there was again a stopped cheque and at page 323, lines 14-19 reference to the 1813 Law. That action was also an application by the Plaintiff to strike out the defence and the counterclaim and again it failed.

However, on page 333 lines 39-41 is the following sentence:-

"In the ordinary way, therefore, and unless there is good reason to the contrary or, put another way, unless there are exceptional circumstances, bills of exchange are to be treated as cash."

In this case, as in the Chesterton case no distinction was made between a countermanded cheque and an uncountermanded cheque. It is clear, however, that the Field Aircraft action was not brought to the attention of the Court in either case, as it was not reported until the Jersey Law Reports 1987-1988.

However, the main question before me is as to whether the decision in the Field Aircraft case has the effect of removing a countermanded cheque from the category of "lettres de change" in Article 1 of the 1813 Law. The Field Aircraft case was in fact an application for leave to appeal against the Order of the Royal Court lifting an interim distraint which had been placed on certain aircraft by means of an Order of Justice. I set out the reasons for the Court's Judgment below as follows:-

"If the distraint is so to be exercised otherwise than on a "pièce signée", it must be based on, and supported by, some affidavit. In this case there was no affidavit at all, and it was admitted that the distraint on this aircraft can only be justified if there were a "pièce signée".

The whole of this matter has been conducted without affidavits, possibly thereby saving some expense but putting the Court in a rather embarrassing situation: one gets versions of advocates' recollections of what was or was not said at that particular time. But nevertheless the situation now seems to have clarified itself to this, that the Order that was made for a distraint originally could only have been supported if there were a "pièce signée". To produce a cheque which has been countermanded seems to me not to satisfy that requirement, because it is not an admission of a debt, it is a notification of a dispute as to a debt, by the very fact that the countermanding words are written across the top of the cheque. It therefore appears to me that there is no case which could be argued to support the contention that this arrest was in fact justified without any other basis. That being so, I regret to say that I feel that the matter ought not to be able to proceed further and I refuse leave to appeal."

The problem that I face in this action is that the learned Judge of the Court of Appeal goes beyond saying that the arrêt ought to be lifted and in fact says that it was never justified in the first place upon the basis of the cheque being a pièce signée.

I find it very difficult to reconcile the Field Aircraft case with the Chestertons case, the Burke case and the Law of 1813. Although the Court of Appeal is the Higher Court, it may be that the Field Aircraft Judgment can be distinguished in some way and it may even be that parts of that Judgment were per incuriam as the Court of Appeal may not have considered the terms of the 1813 Law. The grounds for the lifting of the arrêt by the Royal Court in that case were different from the reasons for the decision of the Court of Appeal and the parties may not have anticipated argument on the precise point upon the basis of which the matter was decided.

The legal principles in relation to striking out have been stated repeatedly and most recently on page 13 of the Unreported Judgment of 30th April 1990 in Le Nosh Limited -v- Stirling, Titterington and Amulet Limited. I am quoting the whole of the relevant paragraph:-

"As was stated by the learned Bailiff in Lablanc Ltd -v- Nahda Investments Ltd (1985-86) JLR N4 : "The party is not be driven lightly from the public seat of Justice". As we said in Lazard Brothers & Co. (Jersey) Limited -v- Bois and Bois, Perrier and Labesse we would only add the words used in Dyson -v- Attorney General (1910) 1KB 419 : "Except in cases where the cause of action was obviously and almost incontestably bad".

I cannot say that the Plaintiffs' case is obviously and almost incontestably bad as the Law appears to me to be unclear and therefore I cannot strike out upon this basis.

The argument of Advocate Thacker in relation to the two actions may have some merit in relation to the second action. Precedents which were put before me indicated either that the second action would be struck out or one of the actions stayed pending the hearing of the other. In this case the first action is currently technically stayed as no particulars of claim have been filed. Rule 6/2(1) states:-

"Unless otherwise directed by the Court and save as provided by any enactment, every action in the Court shall be instituted by simple action or by Order of Justice."

Rule 6/2(2)(h) places actions for the confirmation of arrests in the category of a simple action for the purposes of the Rules. Rule 6/7(2) states, "When an action for a debt or a liquidated demand is placed on the pending list after proceedings have been instituted by simple action, the plaintiff shall within twenty-one days of the date on which the action was placed on such list file particulars of his claim, and the action shall be stayed until such particulars are filed." The action is therefore currently stayed as the Plaintiff has not filed any particulars of claim and the answer which has been 'filed' is of no effect.

This is not an application for dismissal of the first action by reason of lack of prosecution thereof. If the Defendant wants to make a point in relation to that then a summons should be issued to show cause why the Plaintiff should not be ordered to file particulars of claim within a period of time.

If I had been satisfied that the Law was absolutely clear on the basis of the Field Aircraft case then I would have proceeded to strike out the action as otherwise an abuse of the process of the Court and this upon the following basis:-

- (a) the Ordre Provisoire was obtained under the Common Law and the 1813 Law, upon the basis of a pièce signée, and upon no other basis.
- (b) As an Ordre Provisoire is a very powerful remedy giving an immediate arrest without any need for an affidavit to be sworn, it must be very jealously guarded by the Court and in the eventuality of it's being wrongly obtained the Court ought not to hesitate to dismiss the action. This is particularly so as the issuing of an Ordre Provisoire has been delegated by the Bailiff to his secretary who only refers matters to the Bailiff in cases in which the secretary is uncertain.

(c) In my view there is no necessity for mala fide in relation to an abuse of the process of the Court. Although this is required for the tort of abuse of process, that cannot be so in relation to abuse of process. If that were not so then this would mean that the actions of litigants who had commenced actions incorrectly could only be struck out if they were not acting in good faith.

Clearly that would not be a satisfactory state of affairs and one of the tests of abuse of process must be whether the process of the Court has been correctly used.

I quote now from paragraph 18/19/17 of the Supreme Court Practice 1988:-

"ABUSE OF THE PROCESS OF THE COURT" - Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court". This term connotes that the process of the Court must be used bona fide and properly and must not be abused."

I take the view that the words "bona fide and properly and must not be abused" should be read disjunctively. Accordingly, if the Law had been sufficiently certain I would have taken the view that the obtaining of the Ordre Provisoire incorrectly was a wrong use of Court process and therefore an abuse of the process of the Court within the terms of Rule 6/13(d).

The parties will need to address me on the matter of costs in relation to this application.

AUTHORITIES

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R.S.C. (1988 Ed'n): para 18/19/17

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Chestertons -v- Leisure Enterprises (1985-86)JLR 271

Burke -v- Sogex International, Ltd (1985-86)JLR 316

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