

ROYAL COURT
(Samedi Division) 174

31st December, 1993

Before: The Bailiff, and
Jurats Orchard and Gruchy

BETWEEN

Mayo Associates S.A.
Troy Associates Limited
T.T.S. International S.A.
AND Anagram (Bermuda) Ltd
Robert Young
Maureen Young
Lionrock Ltd
Edgefield Ltd
Box Ltd
Cantrade Private Bank
Switzerland (C.I.) Ltd

FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF
FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FIRST PARTY CITED
SECOND PARTY CITED
THIRD PARTY CITED
FOURTH PARTY CITED

Application by the Defendants to discharge an Anton Piller Order.

Advocate C.J. Scholefield for the Defendants.
Advocate P.C. Sinel for the Plaintiff.

JUDGMENT

THE BAILIFF: The Court sat this morning to hear an application from Dr. Robert Young, the second defendant in an action brought against him, Anagram (Bermuda) Limited, Mrs. Maureen Young and a number of parties cited who are not really germane to today's argument by three plaintiffs, the main one being Mayo Associates S.A.

The plaintiffs obtained from the Bailiff on Christmas Eve an Anton Piller Order in fairly stringent terms with permission to use the information thus obtained when the order was executed in other actions outside this jurisdiction. The plaintiffs also

obtained some Mareva injunctions with which we need not concern ourselves this morning because the parties have agreed that they may be varied after negotiations have taken place between them and so we confine ourselves to the question of the Anton Piller Order.

The first plaintiff, Mayo Associates S.A., is a limited liability company incorporated in Geneva. Troy Associates Limited, the second plaintiff, is a limited liability company incorporated in Libya. Troy was appointed at some stage as investment manager for some of the clients investing funds with Mayo. T.T.S. International S.A., the third plaintiff, is again a company incorporated in Panama, and is wholly owned by Mayo. Anagram (Bermuda) Limited, the first defendant, is a company incorporated in Bermuda and is either owned or controlled by Dr. & Mrs. Young. Troy has sub-contracted its investment management function in respect of the clients of Mayo to Anagram and therefore Troy and Anagram are contractually related in one sense.

There is a complaint by Advocate Scholefield for Dr. Young firstly that the Anton Piller Order had been obtained in circumstances which were an abuse of the process and secondly when executed that in itself was an abuse. There is nothing improper, we think, in Anton Piller Orders' being obtained very shortly before a public holiday provided that no unfair advantage is taken of a defendant during the holiday. None was taken here, except that the plaintiffs had to prepare their case for the Viscount, whom they agreed to meet at 11.30 a.m. on the first working day (29th December, 1993) after the holidays.

We think therefore that there is nothing in the argument that there was anything improper in the plaintiffs' attending at the Bailiff's Chambers to obtain - if they could - an Anton Piller Order and a Mareva injunction at the same time, shortly before the recent Public Holidays.

Secondly, there is a complaint by Dr. Young that the Anton Piller Order was oppressively executed. We were informed by Mr. Sinel that he attended at "Edgefield", a house owned or lived in by Dr. Young - I think he owns it through a company - at 11.30 a.m., as I have said, with a Viscount's Officer. They were informed that the defendant - by the defendant I mean Dr. Young - had gone to town. It is not necessary for me to repeat the strange happenings in town which we were told involved the defendant's going to the Trustee Savings Bank and leaving by the back door; that is irrelevant; what is germane is that shortly afterwards he was followed back to his house, "Edgefield", where the first part of the Anton Piller Order was executed. We were informed that the list of documents taken from "Edgefield" was signed by Dr. Young and therefore there was nothing improper as far as the execution was concerned. However, when the plaintiffs, with their lawyers and the Viscount, attended at the offices in town of Dr. Young and his companies they took away seven large

boxes, which they added as best they could to the bottom of the list; the normal requirement - which had been carried out at "Edgefield" - that there should be a signed list of documents taken away had been waived by Advocate Scholefield. He was wrong in law as he frankly admitted to give that advice, but waived it was and therefore we cannot find that in the execution of the Anton Piller Order there was anything improper or oppressive.

Now, of course, that does not dispose of all the other arguments which Mr. Scholefield has fully laid before us that on the facts and in law the plaintiffs were not entitled to and should not have been granted an Anton Piller Order. There are, however, a number of matters which have disturbed the Court and to which we must refer.

There is obviously a serious dispute between the plaintiffs - when I say the plaintiffs I mean Mayo Associates - and Dr. Young and possibly Anagram, the First Defendant. There are clear lines of approach which this Court has to take when considering whether to impose an Anton Piller Order; whether *ex parte* or *inter partes* is not relevant. Those clear lines were set out in Channel Islands and International Law Trust Company Limited in their capacity as the trustee of the Halifax Trust and others -v- John Menzies Scarborough and others (1st June, 1989) Jersey Unreported; (1989) J.L.R. 354. On page 3 of the unreported Judgment the Court said this:

"We are satisfied the Royal Court also has inherent jurisdiction to order defendants to "permit" plaintiffs' representatives to enter defendants' premises to inspect and remove material and papers but the circumstances must be "most exceptional" or "very exceptional"; the plaintiffs must have a very strong prima facie case, the actual or potential damage must be very serious and there must be clear evidence that the defendants possess vital material which they might destroy or dispose of so as to defeat the ends of justice."

Whilst we accept that very clear statement of the necessary safeguards to be looked at and observed before an Anton Piller Order is granted, we think that the Court should not be too tender in applying those requirements so stringently as to defeat the interests of justice. We are, as has been said in many cases, an international finance centre the size of which is a matter of dispute but it is certainly one of some significance. This is a small jurisdiction unlike the United Kingdom, which is a large jurisdiction and it is important that this Court should as far as possible uphold and maintain the good name of the Island as a reputable Finance Centre; that does not apply to the same extent in the United Kingdom.

It is difficult to go into the background to this case in detail as much of what we have been told this morning has not been

deposed to particularly by Dr. Young; however the plaintiffs say that Dr. Young through his companies has misappropriated a very large sum of money. Dr. Young answers that by saying in effect: "Well, from the way in which you have prepared the accounts (and the Cantrade Private Bank Switzerland (C.I.) Limited is the trustee of the monies of Mayo and Anagram) the accounts appear to show that, but I have prepared my accounts, or my companies have prepared accounts for submission to the plaintiffs, on a totally different basis; it is not just a cash basis; there are a number of other matters which I have taken into account. I use the cleared cash arrangement; I use the uncleared foreign exchange deals; I use the foreign exchange position, and I use options. If you with your accountants had looked at the figures using my formula you would have found that it is not the case that I have misappropriated - Mr. Sinel has quite openly said stolen - enormous sums of money". Mr. Sinel told us that the CID of Jersey are investigating these claims.

To support his suggestion that that was the position, Dr. Young has produced a draft letter, undated, prepared by Mr. A. G. Williams, a partner of Touche Ross, and which had been originally drafted by Mr. Williams but was re-drafted by Dr. Young, which sets out the kind of claim he is now making and to which he did not depose in his affidavit other than in a general way. The explanation which he has given through his counsel for not covering all the matters raised by his counsel today - and it is one with which we could have some sympathy - is that he has had very little time to prepare the affidavit given that the only time the Court could sit was today and that he did not know until yesterday afternoon that the Court was prepared to sit at all. It was interesting to note that that draft letter, if it has been signed, was not produced. We were told by counsel that it was not signed because circumstances arose which meant that it had been overtaken by events. We were also told by counsel that it might be among the papers seized by the plaintiffs. As regards the special arrangements for accounting in this way, the Court makes no comment as to how accounts should be prepared and for what purposes; that is entirely a matter of contractual arrangement between the parties and the Court is not competent to express a view as to what is the proper way to present these accounts without hearing a good deal more evidence from experts in these matters, however, we were told that the arrangement that Dr. Young had with the plaintiffs, and particularly with Mr. Stott the claimant through Mayo, was that there would be this special arrangement to present the accounts in this way and that was clearly shown not only by the draft letter I have mentioned, but also by a number of other letters and correspondence. We think the importance of these matters was such that these arrangements should indeed have been kept in a very careful place even if they may have been taken; we do not know about that. Dr. Young was asked if there were any papers and documents he wanted to retain at the time the Order was obtained and executed, and apparently he

said that there were not. On the other hand, it is claimed from what has been said by Mr. Scholefield for Dr. Young, that at some stage during the dispute which arose in the latter part of this year, he said to Mr. Stott that he was prepared to make available any papers which the plaintiffs needed; and again that was not referred to in Dr. Young's affidavit. For reasons we can understand it may have been overlooked.

Now the Anton Piller Order has been attacked because it is claimed that it did not conform to the requirements set out in Channel Islands and International Law Trust -v- Scarborough, which I mentioned briefly earlier in this Judgment. As said, the Court must not be too tender in enforcing those requirements; however there are number of background matters which have troubled us. We have mentioned the letter. In the draft letter, Dr. Young suggests that the problem had arisen out of the failure of the Cantrade Private Bank Switzerland (C.I.) Limited to understand his methods of preparing accounts and that these apparent errors in the accounts were there due to mistakes by the bank. If that is so, and if you look at paragraphs 14 and 15 of Mr. Stott's affidavit, these errors would have been there for a very long time and the Court thinks it unlikely that they would not have been picked up earlier if Dr. Young is correct. There is an interesting letter (an open letter) to Mr. Scholefield from Advocate Sinel of the 30th December, which indicates the willingness on the part of the plaintiffs to co-operate as far as they possibly can, with the defendant in assisting him, if only he had given the proper information, in finding out what had happened to the money; because it is clear that some money is missing but depending on the form of accounting the amount may vary considerably, if one accepts the plaintiffs' allegation or if one accepts the defendants suggestions and explanations. So there was clearly, as at the 30th December, 1993, yesterday, an attempt by the plaintiffs to assist the defendants as far as they could. Mr. Sinel, quite rightly, has pointed out that his clients are at risk from their investment clients, and said quite clearly that Mayo is ruined as a result of these tremendous losses which they have to explain to their clients. Dr. Young would say there are no such losses because of his form of accounting. But in considering whether an Anton Piller Order should continue, we have had to look also at Dr. Young's position. There were three cheques which, in the vernacular, "bounced". We need not go into details except to say that it was not denied by Dr. Young that the accounts they requested were due. He has this morning through his counsel given an explanation, which was rejected by Mr. Sinel, who says quite candidly and clearly that Dr. Young is insolvent. We were told that the Bank of Bermuda which is the Bank that he uses to pay debts (or some debts) is fed with money as when the need arises and although he issued cheques he did not place the bank in funds because, as far as the third cheque is concerned, which we shall look at in more detail in a moment, he distrusted Mr. Marsh, because Mr. Marsh referred to certain difficulties he might have

with the United States fiscal authorities if the money went to a particular place. That caused Dr. Young to think carefully as to whether something was amiss. He was worried that the special arrangements, which he said existed (and which are not mentioned in his affidavit) for a greater payment of commission of 15% would somehow damage his reputation and that of his company, Anagram, if it became known to the clients of Mayo. He had doubts indeed about all the cheques he issued. The fact remains that there is a clear letter, signed by Dr. Young, to Mr. Marsh in which these doubts are not expressed and he left the payee open on the third cheque. It was then made payable to Advocate Sinel for the plaintiffs. That cheque was dated the 24th December, but was given to Mr. Marsh on the 23rd December. Advocate Sinel's office attempted to present it and not unnaturally on the 23rd December, they were told there were no funds or at any rate it was too early to present. They made a request that it should be presented the next day and it was not met. Now Dr. Young's explanation as to why it was not met is that he had not anticipated that it would have been presented before the Christmas holidays. There is no reservation about this in his letter to Mr. Marsh and we do not think it a very satisfactory explanation.

We turn briefly to the question of the reasons which prompted the plaintiffs to bring this admittedly draconian action against Dr. Young, his companies and his wife. Their cases is quite simple. They say in effect: "We are trustees of our clients' money. We are obliged to bring this action. The money has disappeared we want to know where it has gone and we do not think that Dr. Young can be relied upon not to destroy documents. It is a clear case in which he has equivocated with us both as regards figures when we have had discussions with him". All these matters which we have mentioned only in general terms are set out in more detail in the two affidavits of Mr. Stott and Mr. Marsh and are not controverted in any detail by Dr. Young.

Mr. Scholefield quite rightly has drawn our attention to the passage in the well-known book, Bean on Injunctions (2nd Ed'n) where there is a passage at page 127 which reads:-

"The plaintiff must give an undertaking as to damages" (which indeed was given to the Bailiff) "and the Court must be satisfied that the plaintiff is good for such damages".

It is true that there appear to be no assets as such in the Island other than \$11 million under the control of the plaintiffs as trustees in the Cantrade Private Bank. Mr. Sinel has said that, if necessary, he would make a "Beddoe's" application when he has had more opportunity to consider it. We think that the circumstances of this case are such that it was not possible to provide more information about the position than we have been told this morning or than the Bailiff was told about and had disclosed to him quite openly in the affidavit of Mr. Stott; there were no

assets in the Island belonging to the plaintiffs; but there were amounts due to their clients and hence, presumably, commissions to them. We think that whilst the arguments of Mr. Scholefield have great strength in general terms they are not such that we would wish to accept them. We do not find in all the circumstances of this case that the undertaking in damages is such that it ought by itself to be taken into account solely in order to set aside the Anton Piller Order, notwithstanding the actual absence of direct funds drawable upon by the plaintiffs in this jurisdiction.

There are very serious matters to be tried. There is in our opinion a real risk, from the explanation we have had from Advocate Scholefield, and after looking at the affidavits, that the documents might have been destroyed or disposed of. We are not satisfied with the explanations given to us today, mostly *ex parte* and with very little supported by affidavits by Dr. Young or anyone else who might provide affidavits on his behalf and we accordingly find that the Anton Piller Order was properly imposed and it shall remain.

Authorities

Channel Islands & International Law Trust & Ors. -v- Scarborough
& Ors. (1st June, 1989) Jersey Unreported; (1989) JLR 354.

Bean on Injunctions (2nd Ed'n): p.127: Anton Piller & Similar
Orders.