

ROYAL COURT
(Samedi Division)

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24th March, 1994

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
and Jurats Orchard and Rumfitt

<u>Between:</u>	Kim Kawasaki	<u>First Plaintiff</u>
<u>And:</u>	Steven Cerny	<u>Second Plaintiff</u>
<u>And:</u>	Geoffrey Lee	<u>Third Plaintiff</u>
<u>And:</u>	Mayo Associates S.A.	<u>First Defendant</u>
<u>And:</u>	Troy Associates Limited	<u>Second Defendant</u>
<u>And:</u>	T.T.S. International S.A.	<u>Third Defendant</u>
<u>And:</u>	Michael Gordon Marsh	<u>Fourth Defendant</u>
<u>And:</u>	Myles Tweedale Stott	<u>Fifth Defendant</u>
<u>And:</u>	Monica Gabrielli	<u>Sixth Defendant</u>
<u>And:</u>	Cantrade Private Bank Switzerland (C.I.) Limited	<u>Party Cited</u>

Application by the Defendants to vary/raise Injunctions in the Order of Justice.

Advocate P.C. Sinel for the Defendants.
Advocate M. St. J. O'Connell for the Plaintiffs.
The Party Cited did not appear and was not represented.

JUDGMENT

THE LIEUTENANT BAILIFF: The Plaintiffs took out an Order of Justice on 9th February, 1994, alleging, in terms, that the Defendants to whom they had entrusted, in terms, substantial sums of money have been stealing from them by taking additional commissions over and

above those set out in the investment contracts, justifying them as trading losses; and further complaining that despite instructions to do so, they have not refunded the monies.

The Order of Justice discloses that one of the Plaintiffs, Mr. Kawasaki, had a meeting with Mr. Marsh, the Fourth Defendant, on 5th February, 1994, which disturbed him; and he was further disturbed to hear that the Defendants were proposing to move the funds which remained from the Bank in the Island where they were held to another jurisdiction.

There is an allegation that there is a *prima facie* case that the funds have not been managed properly, and in consequence the Plaintiffs sought and obtained interim relief, paragraphs 1 and 3 of the injunction which read:-

- "1. *restraining the Party Cited whether through its employees, agents, servants or howsoever from transferring, paying away, alienating or disposing of in any manner whatsoever any of the funds held in the designated accounts TTS-F which are set out above in paragraph 12 of this Order of Justice and in which the Plaintiffs or any of them have any interest;*

3. *and service of this Order of Justice upon the Defendants shall operate as an immediate interim injunction restraining them from transferring, paying away, alienating or disposing of in any manner whatsoever any of the funds held in the designated accounts TTS-F which are set out above in paragraph 12 of this Order of Justice or any other accounts in which the Plaintiffs have an interest and requiring them to produce by Affidavit within four working days of service of this Order of Justice upon the Defendants or their Advocates as the case may be full details of all commissions charged to the Plaintiffs and all transfers made in respect of the said accounts during the period following from the 1st October 1990 to date."*

No affidavit accompanied this Order of Justice, but instead Advocate O'Connell wrote a long letter to the learned Bailiff explaining, *inter alia*, that his clients, the Plaintiffs, lived out of the Island and that it was difficult to obtain instructions.

The letter promises an affidavit within the next week or so (which was not forthcoming within that delay) and refers to other proceedings in which the Defendants were involved, arising out of funds of which the Plaintiffs funds formed part. He very properly brought to the attention of the Court the denial of the Defendant's counsel that his clients had acted dishonestly.

As he said in his letter, he (Mr. O'Connell) had only very brief instructions and wished only to preserve the *status quo* until more evidence had been gathered.

The Defendants now seek to discharge the injunctions, or at least to vary them, in order to deal with the funds.

These proceedings are intimately connected with other proceedings brought by the Defendants against those whom they allege have, in their view, made off with funds entrusted to them including, *inter alia*, part of the funds of the three Plaintiffs.

The Defendants have instituted well publicised proceedings, have consulted the Police, and engaged the services of local accountants to plough through the very numerous documents which they have obtained by an Order of this Court.

As part of their calculations, these accountants have arrived at apportionments payable out of the monies still held at the Bank Cantrade to each of the F numbered sub-account holders, which include the three Plaintiffs.

The Defendants propose that 90% of these proportionate amounts thus calculated should be repaid at once to these holders, and that 10% should be retained while they discuss with the holders who, as we say include the Plaintiffs, the possible provision of a "fighting fund".

Put briefly, the Defendants case is that, apart from the allegations made in the Order of Justice, no claim of fraud has been made against them, that they are trying to give back presently 90% of their (the clients') money to their major clients, that they are taking vigorous action to recover the balance due, which is not the action of fraudsters, that no objection has been made to the proportions (of the total account) which they propose to return to each client, and that there was such a lack of disclosure to the learned Bailiff that the injunction should immediately be raised and, on that ground alone, should not be reimposed. Furthermore, that no grounds, properly so called, have ever existed either for the imposition or the reimposition of the injunctions.

Certain assertions of fact were made by counsel as to matters of evidence, but we have not heard witnesses and can of course form no view thereon.

However, we have the affidavits and a number of supporting documents, and it is on these that counsel for the Defendants hangs his application.

We do not, we think, need to go into the precise mechanism by which the monies were dealt with, save insofar as this is strictly necessary for this hearing.

However, we should deal first with what counsel described as a highly material non-disclosure relating to jurisdiction which, he submits, should have been, but was not, put to the learned Bailiff.

Clause 14 of the clients' original agreement with the Third Defendant reads:

"The Agreement is governed by and shall be construed in accordance with the Federal Swiss laws and the laws of the Canton of Geneva, Switzerland. Any dispute which may arise between the parties shall be subject to the jurisdiction of the Geneva Competent Courts and the Federal Supreme Court in Lausanne, Vaud, Switzerland".

A further reference to Swiss law is contained in clause 12, whilst at clause 7 is to be found a provision dealing with the liability (or lack of it) of the Trustee and Investment Manager.

Mr. Sinel's submission on this is short. It was not shown to the learned Bailiff when the injunction was sought and even the affidavit put in (at a late stage) by Mr. Cerny does not deal with it. Before the Court can exercise its discretion, it would have to be able to form a view as to whether proceedings could be started at all in Jersey. Failure to bring this vital provision specifically to the notice of the Court is of itself fatal.

Quite apart from that, counsel went on to make lengthy criticisms of the lack of information given either to the learned Bailiff or indeed to this Court.

These may, perhaps, be summarised quite briefly: neither the Order of Justice nor the accompanying letter, nor Mr. Cerny's affidavit, produced on 28th February but sworn only on 21st March, give anything near enough information.

These, as we understood, fell under three main heads.

First, in the Order of Justice, there is an allegation that the Defendants have extracted monies by way of disguised commissions. No particulars are pleaded; Mr. Cerny, despite having obtained an order against the Bank for details (paragraph 2 of the injunction) has not thought fit to deal with it; and the scheme was set up so that although Mr. Stott had access to the funds, it would seem that Mr. Marsh and Miss Gabrielli may not have done so.

This is a very serious allegation and the basis of the claim for damages and of Mr. Sinel's submission is that it is made but not pursued in any way either by Mr. Cerny nor by the other two Plaintiffs who, for whatever reason, have not thought fit to swear an affidavit at all. Furthermore, Mr. Sinel submits that there is nothing in the correspondence - which includes letters to and from Mr. Cerny - to indicate that this allegation has been raised anywhere except in an ex parte application and the Order of Justice.

Secondly, there is a whole wealth of correspondence, including correspondence which indicates meetings having taken place, some of which antedates and some of which post dates the Order of Justice. In particular Mr. Lee, contrary to what was stated in the Order of Justice, had received a reply to his letter of 9th December, 1993; the Plaintiffs were aware that there were simultaneous instructions to take money out of the Bank to another Bank and then to pass it on to them, or that they were being informed of the position. All Mr. Cerny does, he submits, is to say that the sheer volume of such documentation has left him muddled. This, submits counsel, is disingenuous at best. If he were unable to follow it himself he should at least have put it before the Court. The other Plaintiffs, of course, have remained silent on the subject, apart from correspondence with the Defendants which they have not thought fit to disclose.

All the knowledge the Plaintiffs had should have been put before the Court, not only at the time of the original Order of Justice, but as the information unfolded; and not least before us, instead of which we are left with a plainly deficient Order of Justice, not supported by Mr. Cerny's affidavit, which is very careful to limit his personal knowledge and which omits, even at the stage it was sworn much information which should have been before the Court; and makes no proper attempt to bring any later developments, which may not initially have been known, before the Court.

In reply Mr. O'Connell put his case for the maintenance of the existing injunction on the basis that the money enjoined belonged in part at least to his clients, and that the interests of justice required an over-view. As to the point regarding Swiss law, although the Agreement was included in the bundle put to the learned Bailiff, it was not mentioned in Mr. O'Connell's letter nor in Mr. Cerny's affidavit.

Next, he conceded that Mr. Cerny's affidavit was not over-informative; and that neither Mr. Kawasaki nor Mr. Lee had sworn one.

On proceeding through the correspondence however, he further conceded, and we think rightly, first, that his client's position had changed considerably since 9th February; that the Order of

Justice is inconsistent with the explanations now being offered; and that on the correspondence (including some sent to him overnight) the Court was entitled to take the view that there had been omissions.

The Law is quite clear and has been dealt with by the Courts on a number of previous occasions. It was put to us by counsel and we do not need to restate it here.

Although Mr. O'Connell contended strongly that the omissions were not material it was quite clear to us that the learned Bailiff was given nothing like the picture which should have been put to him and it is impossible to say that on the facts given, the Bailiff could have exercised a discretion. As far as we are concerned, only one Plaintiff has put in an affidavit and that, we must say, falls woefully short of giving the Court sufficient information. The omissions at every stage have been and are highly material. We have no hesitation in raising the injunctions.

Nonetheless, the application has caused us some concern and although it forms no part of and was not material to our decision, we have taken due note of the formal undertaking given by Mr. Sinel to the Court which reads:

"This is an undertaking given by Mayo/Troy and T.T.S. and relates to claims by K. Kawasaki/Cerny/Lee. It is given in their capacity as Plaintiffs in the substantive action: this is intended to demonstrate good faith by the aforementioned parties because it is their intention to have these proceedings struck out and the order for service out of the jurisdiction reversed.

- (1) *none of Mayo/Troy/or T.T.S. will remove from this jurisdiction without the permission of this Court/or of the specific party entitled to the specific sum in question, any of the funds which they offered to repatriate to Messrs. Kawasaki, Cerny and Lee in their letters of the 23rd February, 1994, addressed to those gentlemen;*
- (2) *the additional sum being in each case a 10% increment above the sums mentioned in the aforementioned letters will likewise not be removed from the jurisdiction without the permission of the Court or of the specific party entitled to the specific sum in question;*
- (3) *Mayo/Troy and T.T.S. will utilise their best endeavours to pay the monies mentioned in paragraph (1) above to a US\$ account at Messrs. Bailhache and Bailhache.*