

ROYAL COURT
(Samedi Division)

135.

10th July, 1995

Before: The Deputy Bailiff

Between:	Arya Holdings Limited	Plaintiff
And:	Minories Finance Limited	Defendant

Advocate R. J. Michel for the plaintiff
Advocate A. Dessain for the defendant

JUDGMENT

THE DEPUTY BAILIFF: The matter before me today is a relatively compact question of law. The question that I have to answer is whether a claim based on the principle of d'Allain v. de Gruchy (1890) 214 Ex 196 is a cause of action founded on tort and as such is prescribed as held by the Court of Appeal in its detailed judgment of 28th April, 1994, in this action. The Defendant does not accept (except for the purpose of this hearing) that a d'Allain v. de Gruchy claim exists in Jersey Law.

The chronology is set out in great detail by the learned Court of Appeal in its judgment but a selection of dates may be helpful to consider.

On 16th January, 1986, Minories obtained judgment in England against Arya for £11,495,405 and US\$ 833,601.67c. The next day, Minories made a successful *ex parte* application to the Royal Court to receive the *déclaration en désastre* of the movable property of Arya. The *déclaration en désastre* was necessary because it was within ten days of a judgment in this Court for £1,783,038 plus interest obtained by Hill Street Trustees Limited (the shareholders of Arya) on 10th January. On 8th March, 1988 the *déclaration en désastre* was recalled on the representation of Hill Street. It was there stated that "all claims in the *désastre* had been satisfied and/or appropriate provision had been made for the claims so that Arya was no longer insolvent and the continuation of the *désastre* served no useful purpose".

On 14th February, 1991, Arya commenced its action by way of Order of Justice. Some thirteen months later, on 31st March,

1992, this Court dismissed Minories' application to strike out the amended Order of Justice.

5 The English action by Arya against Minories and others was struck out in England on 25th January, 1993, and that decision was upheld by the English Court of Appeal.

10 Minories appeal against the refusal of this Court to strike out the amended Order of Justice came before the Jersey Court of Appeal and on the 28th April, 1994, the Order of Justice was struck out except for an opportunity to claim for damages on the basis of d'Allain v. de Gruchy. The amendment was made, and an application to strike out followed. It is following the application to strike out the amended Order of Justice on 15th June, 1995, that the Judicial Greffier ordered the question now before me to be determined and adjourned the striking out application which had been made by summons on 16th November, 1994.

15 It may be useful if I hone and polish the question posed by citing the Order of the Judicial Greffier of 15th June. I am to determine:

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- 25 "1. the issue as to whether or not a claim based on the principle of d'Allain v. de Gruchy is a cause of action founded on tort and, as such is prescribed as held in the judgment of the Court of Appeal dated 28th April, 1994, and;
 - 30 2. the issue as to whether such claim is or is not prescribed in any event."

35 It will be helpful at this stage to look at what the Court of Appeal said relevant to this matter in its judgment of 28th April, 1994.

At page 8 the Court sets out the causes of action pleaded in the amended Order of Justice and says this at page 9:

40 "A cause of action giving rise to a claim for damages for an improper *déclaration en désastre* arising out of the principles expressed (though mainly by implication) in d'Allain v. de Gruchy (1890) 214 Ex 196 Royal Court. My comments on the cause of action for malicious prosecution apply similarly to this cause of action".

45 Again at page 14 the Court said:

50 "But, despite a *déclaration en désastre*, two steps have always been open to a debtor:-

(1) A debtor could apply to the Royal Court for the *désastre* to be recalled on the ground that the *déclaration*

ought not to have been made. This appears clearly from the case of d'Allain (above). The basis for an application to recall the déclaration might be that the person who made the déclaration had no claim against the debtor. That was the position in d'Allain, where the creditor had proceeded against a guarantor without first exercising his rights against the principal debtor as required by Jersey Law. Or the basis might be that the debtor was not insolvent, or some other basis. Such an application was open to the debtor, whether an individual or a company or other corporate person. The application could be made on the company's behalf by the directors or shareholders. The ability to make such an application to recall the déclaration was confirmed in Article 7 of the 1990 Law. It was and is essential that such an unfettered right to apply to lift a désastre was and is available to a debtor, whether an individual or a company, because a déclaration en désastre is approved by the Court ex parte and without notice to the debtor. A déclaration en désastre may be made wrongly, and a debtor must be able, as soon as he has notice of the déclaration, to go to the Court to remedy what might otherwise be irreversible effects of a wrongful déclaration. In this respect Arya was not incapable of acting. I return later to the position as regards information and documents.

(2) A debtor has a right of action for damages in respect of any loss sustained as a consequence of a déclaration being wrongly made by an applicant who has not acted reasonably and in good faith. Such a right of action was recognised and given effect by the Royal Court in d'Allain. In that case the basis of the right of action was that the applicant in fact had no valid claim against the debtor, whether or not the debtor was insolvent. The right of action has been confirmed in Article 6(3) of the 1990 Law. However, it is possible that Article 6(3) has made a change in the Law since it appears to make proof that the debtor was not insolvent at the date of the déclaration a pre-condition for success on the right of action. Further, Article 6(4) of the 1990 Law provides a prescriptive period of 12 months from the date of the déclaration for the bringing of such an action.

In my judgment the lifting of a déclaration would normally be necessary before such a right of action could be pursued to a successful conclusion. But there would be nothing preventing a debtor simultaneously or successively both applying to lift the déclaration, and bringing a claim for damages. This was open to Arya, and in this respect also Arya was not incapable of acting."

The Court said at page 16:

"Arya therefore has no answer to prescription in respect of its tort claims which must be struck out.

5 That brings me to the question: what are Arya's tort claims? I begin by reference to the summary of six causes of action I have already set out, and deal with each in turn:

10 (1) Contract. It is common ground that this is not prescribed.

(2) and (3) Breaches of duties of care in Jersey and English Law. These are tort claims and are prescribed.

15 (4) Abus de droit. This is also a tort claim and Advocate Michel did not seek to argue otherwise.

20 (5) Malicious prosecution. This is a tort claim and similarly Advocate Michel did not argue to the contrary.

25 (6) Damages for improper déclaration en désastre. This cause of action presents greater difficulty of classification. The position after the 1990 Law is that there is a statutory right of action (Article 6(3)), and a statutory period of prescription (Article 6(4)) which means that Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960, does not apply. But we have to consider the position before the 1990 Law came into force. d'Allain provides the only example we have seen of an action of this kind. It is arguable that such an action is of the nature of an action founded on tort within the wording of Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960, by analogy with actions for malicious presentation of insolvency or bankruptcy petitions or with actions for abuse of civil process. But it is also arguable that such an action is sui generis, of its own kind, and not one "founded on tort". At trial, or perhaps before then, the Royal Court will have to decide this question finally. In my judgment we cannot and should not now decide it. The parties have chosen not to make any detailed submissions on this question. Advocate Dessain for Minories simply assumed that this was an action founded on tort. Advocate Michel for Arya simply contended without supportive argument that it was not so founded. Before this question could finally be determined the Advocates of the parties would have to research this question fully and make full submissions on it. In the absence of such submissions this Court could not strike out this cause of action on the ground that it is prescribed by Article 2. Further, if there is any discretion available I would not be minded to exercise

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such discretion in favour of striking out this cause of action at this stage.

5 However, as already indicated this cause of action is not yet properly pleaded in the amended Order of Justice. It will be necessary for the amended Order of Justice to be re-amended, if Arya so applies, to plead this cause of action. If that happens it will be open to Minories, if so wished, to apply to strike out this cause of action.
10 On that occasion it will be possible for the matter to be fully argued."

I need then to look at d'Allain v. de Gruchy to see what that case decided and, as a corollary, to decide what is meant in this jurisdiction by "tort". Is there, in Jersey, any different meaning to the word "tort" than that clearly understood by English practitioners? If "tort" comes from the French "tort" or wrong, it also comes from the Latin "tortus", some conduct twisted from the norm.

20 The matter is most clearly summarized in the Court of Appeal where Southwell J.A. said in his judgment - "It seems to me to be reasonably arguable that the deficiencies in Mr. Harper's affidavit and the potential criticisms of Minories' conduct point rather to Arya being allowed to pursue a d'Allain claim." To that sentence I will need to add the words "if the claim is not prescribed".

30 The Law Reform (Miscellaneous Provisions) (Jersey) Law extends the period of prescription of actions founded in tort from "l'an et jour" to "les trois ans". Tort is defined as a "tort personnel" or "tort matériel". It is interesting to note that Article 5 of the Law which deals with joint tortfeasors (and is a mirror image of the English legislation) commences with these words:
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"Where damage is suffered by any person as a result of a tort (whether a crime or not)

40 D'Allain v. de Gruchy

The facts of the action are comparatively simple. Mr. George d'Allain had signed "trois faits obligatoires portant intérêt". These had been guaranteed by his father, Mr. Charles d'Allain and were in favour of Edward de Gruchy. Mr. de Gruchy put Mr. Charles d'Allain en désastre but the Court judged in due course of time that the désastre was mal institué as it had brought down not the principal but only the caution. An action was then commenced by Charles d'Allain by way of remontrance. The word "tort" occurs regularly in the pleadings which lead up to the judgment itself.
45 All the wording of course is in the French language. The claim was based not only on the wrongful actions of the defendant but
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also because there had been apparently a grave alteration in the health of the plaintiff (I see that he was about 80 years of age) and his honour had been impeached.

5 Advocate Dessain agrees with one of the conclusions of the Court of Appeal. When the Court of Appeal said "a debtor has a right of action for damages in respect of any losses sustained as a consequence of a declaration being wrongly made by an applicant who has not acted reasonably and in good faith and that such a right of action was recognised and given effect by the Royal Court in *D'Allain*", he says that is entirely consistent with the concept of a tort. Advocate Dessain argued strongly before me that reasonableness peppers the whole of the concept of the law of tort where there is a duty of care to act reasonably. If that is so, then I can only wonder how the tort of defamation would fit that concept. English judge will talk of the man on the Clapham omnibus. The French judge prefers the words "*homme avisé*". Jersey practitioners would clearly understand Napoleon's suggestion that the law should require people to act "*comme un bon père de famille*". If a tort is an act or omission which is unauthorised by law the French Court would understand that principle under the doctrine of "*abus de droit*". It seems to me that French law requires for what is now called a "*délit*" the constituents of damage; an act generating or giving rise to responsibility; and "*cause*" or "*lien de causalité*" between the act and the damage. Of course all these words in translation bristle with difficulty. The French jurist speaks of damage as "*un intérêt légitime juridiquement protégé*". In *Watson v. Priddy* (1977) JJ 145 the Court said at 152.

30 "A tort is difficult to define, but in Clerk and Lindsell on Torts (13th Edition) at paragraph 1, the following definition given by Sir Percy Winfield is cited with approval:

35 "*Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages.*"

40 The Court went on to say this:-

45 "*As regards the third constituent of the definition, we are in no doubt that such a breach is not redressable by an action for unliquidated damages, which, as is stated in Halsbury's Laws of England (Third Edition) Volume 37, paragraph 186, note (c), is the only remedy which is common to all rights of action arising from tortious conduct.*"

50 And then went on at page 153 to say this:-

"The plaintiff argued that the Court should not be governed too closely by the English definition of a tort, but should apply the wider Norman conception of a "tort". We were not referred to any authority as to the difference between the two, but we consider that the definition which we have given equally applies to a tort in Jersey law."

That case perhaps hangs a little unhappily with the wording of this Court in Guernsey States Insurance Authority v. Ernest Farley & Son Limited (1953) JJ 47 at 48, where the Court said this:-

"These proceedings are brought by the States Insurance Authority of Guernsey, hereinafter called "the Insurance Authority". The only question to be decided is this. Can this claim, which arises out of the accident and is brought not by Mr. Le Cras but by the Insurance Authority, be enforced in this Court in Jersey, or does the Law of Jersey prevent it from being enforced here because it is based on the assignment of a right of action arising from a tort? The word "tort" is used here in the sense in which it is commonly used by English lawyers when they speak of the Law of Torts as opposed to the Law of Contracts. On grounds of convenience this may be permitted, provided that it is done without losing sight of the fact that this is a Jersey Court administering Jersey Law, whether it be the internal domestic Law of Jersey, or the principles of Private International Law as they are applied by Jersey Courts."

Having considered very carefully the later Jersey cases cited to me by Counsel, I am drawn to the ineluctable conclusion that as time has moved on, we have moved ever closer to the English concept of tort. Advocate Dessain had no doubt that Winfield had supplanted anything on this subject that Dalloz might have to say. If there was a claim made against D'Allain Père, "sans droit" that arose because of a legal obligation on the creditor to sue the principal debtor before the surety. It seems to me that one can look at the facts in d'Allain v. de Gruchy and analyse them by saying that there was in that case an act unauthorised by law independent of contract which infringed the absolute right to have the goods of the principal "discussed" before those of the caution. This gave rise to an action for damages. These damages were awarded by the Court and were substantial.

We have a dispute over the circumstance in which the procedural use of the Remontrance was utilised. Advocate Dessain argued that the Remontrance was a procedure used only for claims founded on tort and specifically for claims founded on "tort personnel". He cited Le Gros "Traité du Droit Coutumier de l'Île de Jersey" (Jersey, 1943). We gather from Le Gros that the Remontrance was uniquely used for a "tort personnel". It is

interesting to note that Rule 9 of the Royal Court Rules of 1963 says:-

5 *"An action founded on tort personnel shall no longer be instituted by means of a "Remonstrance" but by Order of Justice in the same manner as an action founded on a "tort matériel".*

10 That may support, in my view, the contention that d'Allain v. de Gruchy was a "tort personnel". If the action is founded on tort then it is prescribed.

15 I was asked to consider a case referred to me by Advocate Michel - Ex parte application by the Official Receiver and Provisional Liquidator of Royco Investment Company Limited, for leave to declare the Company en désastre (1st June, 1989) Jersey Unreported where the Court said in a very short judgment:-

20 *"Thus, under the common law there was no protection against a frivolous or vexatious declaration. The remedy lay in an action to have the "désastre" raised and in damages.*

25 *Rule 12/3 of the Royal Court Rules, 1982, is intended, as was its predecessor, Rule 12/3 of the Royal Court Rules, 1968, to place a brake or restriction on the ability to declare a "désastre" by empowering the Court to refuse to receive the declaration where, inter alia, the declaration is made by the debtor unless it states that he is insolvent but has realisable assets and that declaration is verified by affidavit. The intention of those who enacted the rule, as we conceive it to be, was to avoid frivolous or vexatious declarations, the harm caused by which would not necessarily be sufficiently remedied by an*
30 *award of damages."*
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40 But that case serves only to remind me that the granting of a *désastre* is now within the discretion of the Court because it is granted with leave. Under the old common law the application for a *désastre* merely had to be received by the Court and the only remedy (which may well be a remedy in tort) was to have the *désastre* raised and then if thought fit pursue in damages. It seems to me that the modern concept of *désastre* has been a continuing refinement of the old law. In Re Désastre Overseas Insurance Brokers Limited (1966) JJ 547, the judgment ends with
45 these words:-

50 *"The Court will, furthermore, recommend to the Rules Committee that a Rule be made requiring that all applications made for permission to declare the assets of a debtor "en désastre" shall state the amount of and what*

the sum claimed is for and the grounds on which it is alleged that the debtor is insolvent."

5 And of course matters are now even more regulated by the Bankruptcy (Désastre) (Jersey) Law 1990.

10 It is very surprising to me that d'Allain appears to be the only case that Counsel have been able to find where an action in damages has been brought following the raising of a *désastre* against an applicant who has abused the system. Even the case of Instantbuild (Overseas) Limited v. Lansair Limited 264 Ex 466, which was a fiercely contested action, only resulted in the raising of the *désastre* and the payment of the costs.

15 In the application to serve this matter out of the jurisdiction granted by the learned Judicial Greffier on 11th February, 1991, Advocate Michel filed an affidavit in support. In that affidavit he said this:-

20 "8. THAT the Royal Court of Jersey is the only forum before which Arya's complaint can be heard because the substance of the complaint is that Mr. Harper misled the Royal Court into coming to a decision to which it would not otherwise have come. That it is open to the Royal Court, if satisfied that it was misled into making the declaration which it did, to award damages to Arya against the Bank. *D'ALLAIN -v- DE GRUCHY* (1890) 214 Ex. 196.

25 9. THAT to apply to the Royal Court for a declaration of *désastre* and not to make full and frank disclosure of all material facts and matters is to commit a tort. This application is accordingly made under the provisions of Rule 7(f) of the Service of Process (Jersey) Rules, 1961, for leave to serve these proceedings upon the Bank out of the jurisdiction."

30 In d'Allain v. de Gruchy there was no claim made at all. There was, of course, an unliquidated claim in Brandaris re Désastre Overseas Insurance Brokers Ltd (1966) JJ 547 and a disputed claim in re Instantbuild Overseas Ltd (1977) 264 Ex 466. In these three cases there are three examples given of the raising of a *désastre* and they apply whether the putative debtor is solvent or insolvent. Article 6(3) of the Bankruptcy (Désastre) (Jersey) Law, 1990, only applies if the debtor is solvent. It is also clear that the action may not be pursued (if d'Allain v. de Gruchy is a proper cause of action) until after the *désastre* has been raised.

45 Advocate Michel says that the present action probably falls under one of three main headings. (1) a right *sui generis*, (2) the inherent jurisdiction of the Court to regulate its own procedure and to punish abuses when they occur and (3) the

enforcement of an implied undertaking to the Court to be responsible for any damage inflicted by the improper use of the process.

5 He implied to me that on the question of the *Remontrance*, there was a procedural benefit in using it because it gave a more pliable form of action than the Order of Justice, which did not, for example, allow the Court to give relief of its own motion. If
10 the action in *d'Allain v. de Gruchy* is 'sui generis' then there could be no statutory right of prescription and only an unreasonable delay which caused prejudice to the defendant would cause the action to be time-barred. To support his argument, Advocate Michel relied on *Digital Equipment Corporation and Anr. v. Darkcrest Limited* (1984) 1 Ch 512. He referred to 519 where
15 the Court, dealing with an earlier judgment, said this:-

20 *"After referring to a number of authorities, including Griffith v. Blake, 27 Ch.D. 474 and Smith v. Day, 21 Ch.D. 421 to which I have already referred, Peter Gibson J. said, at p. 69:*

25 *"These authorities make it clear that the ordinary practice of the court is that there should be a cross-undertaking in damages given by a plaintiff seeking interlocutory relief and that normally but not invariably, an applicant whose injunction is not continued will be required to pay damages. In Smith v. Day, 21 Ch.D. 421, 428 Brett L.J. stated that in his view there was no contract on which the party seeking the damages could sue. None of those authorities, it
30 seems to me, establishes that there is any right, in the sense of one that is enforceable in the courts, in the party claiming damages under the cross-undertaking. The cases show that such a person is of course entitled to ask the court to order such damages and normally he
35 will get them.*

40 *The only other passage that I need read on that part of the claim is where Peter Gibson J. said, at p. 70:*

45 *"In my judgment this is not a contractual matter, nor in my judgment is there anything that could be said to amount to a tort when a plaintiff obtains an injunction from the court but subsequently fails to persuade the court to grant a permanent injunction. Again I would find it astonishing if this were to give rise to a claim in damages on the footing that the plaintiff had acted tortiously. True it is that the basis of an award of damages pursuant to the undertaking is to recompense the person affected by the injunction for
50 being kept out of his money, but in my judgment that does not amount to a tort in respect of which that*

person can sue independently of seeking the assistance of the court to enforce the undertaking. I have no hesitation in striking out the counterclaim so far as it relates to the undertaking."

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With deference to Advocate Michel's argument I cannot conceive that it is supportable. The English cases deal with situations that arise where undertakings and cross-undertakings have been given when, of course, the Court will be able to regulate its own procedures. On an application for *désastre* there is no requirement to give an undertaking in damages and it seems to me clear that it is an undertaking in damages that prevents a separate cause of action arising in tort. That becomes more clear when one reads the judgment of Faulkner J at 518 where he says this:

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"The Court is of course the master of its own procedure and in the form of the Anton Piller order (which of course is a strong order of a very stringent form) the Court always asserts, seeks to retain and does retain total control of the order, in particular as to (a) the determination as to whether the order be properly made (b) the determination of the meaning of the order once made (c) the determination of the consequences of finding that the order was not properly made and (d) the determination of the consequences of finding that an order once made has been broken."

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What Advocate Michel appeared to me to be saying was that if there was no actual undertaking there was an implied undertaking. The Court is able to recall, or raise, a *désastre* and then, as master of its own procedure, it will go on to exercise its inherent jurisdiction to decide how best to act. It is not, according to Advocate Michel, a cause of action between the creditor and the putative debtor that concerns the Court. It is the right of the Court to penalize a wrong-doer. It does that by exercising its inherent jurisdiction. By way of example, if a Court has made an order for an injunction relying on what it has been told it can penalize the applicant when a lack of candour is disclosed. He said that I should ignore the fact that no cross-undertaking in damages on a *désastre* has been given because the consequences of a false application can be, and in this case were, as devastating as in an improperly obtained injunction or Anton Piller order. Is there, he says, any difference between an improperly brought injunction and an improperly brought *désastre*? But it seems clear that because the Court has not been given an undertaking in damages and has no weapons in its armoury to police the order that a separate action has to be commenced. Advocate Michel says that this is not truly a fresh action but is merely a reminder to the Court of what went wrong when the Court had control of the action. But in this case the Court dealt with the matter when it raised the *désastre* and it does seem to me that an

action such as that brought in d'Allain v. De Gruchy is more than a mere statement that there was no right to bring the action in the first place. The claim in that case was clear. There was injury both to health and to reputation. Damages were ordered by the Court. The Court was asked not only to say that the *désastre* was wrongly brought but also to order Mr. de Gruchy to pay the costs and "*le compenser pour les torts, pertes, préjudices et dommages qui peuvent résulter de la conduite illégale.*"

Of course, no undertaking is given to the Court in a declaration of *désastre*. The whole concept of an undertaking in damages is relatively novel in this Court. Advocate Michel argues that we must look to the Court's inherent jurisdiction and regard this present action as "*sui juris*" because there is an implied undertaking given when an application for *désastre* is brought that the party will not mislead the Court. In any event, it was argued that the word "tort" has a quite different meaning in this jurisdiction. Advocate Michel examined the meaning of the word. He gave us a definition from the 1866 Grand Dictionnaire Français-Anglais which defined "tort" as "*lésion, dommage, qu'on souffre ou qu'on fait souffrir; perte, accident, disgrâce*". I must confess that I find the dictionary approach far too simplistic and regard the problem as infinitely more complex. In French law, there is no separate branch of civil law comparable to the English law of torts. Indeed, it seems to me that the rules that apply within the French approach can be seen as part of the law of obligations. In any event, such law as exists on the subject is almost entirely "*loi praetorienne*" or judge made. It does seem to me almost invidious to argue that, after the enormous growth of negligence and other tortious claims in the 1970's and onwards, the English concept of tort does not govern our entire legal thinking. Advocate Michel in hammering home his distinction between a Jersey concept of tort and the English law of torts used the case of Business Computers International Limited v. Registrar of Companies and Others (1988) 1 Ch 229 to explain how the Court in England controlled its own procedures. The case on its simple facts dealt with a petition for winding up served at an incorrect address. The company was unaware of the petition which had wound it up and later it had it set aside. It sued, claiming damages in respect of the damage alleged to have been caused by the making of the winding up order. In its judgment the Court said at page 239:-

"Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck

5 out. If an order is obtained without the prescribed rules
or regulations having been observed, the order may be
discharged or set aside, sometimes by an application at
first instance, sometimes on appeal. The prosecution of
10 the action or of the petition is subject throughout its
career from institution to final judgment to judicial
control. Service of process is a step, and usually an
essential step, in the prosecution. It must usually be
15 proved before an order can be obtained against an absent
defendant. The proposition that a duty of care is owed by
one litigant to another and can be superimposed on the
checks and safeguards that the legal system itself
provides is, to my mind, conceptually odd. The safeguards
20 against ineffective service of process ought to be, and I
think must be, found in the rules and procedures that
govern litigation. The rules and procedures require that,
save on *ex parte* applications, proof of service be shown
before an order is made against an absent party. If the
25 proof of service is false, be it through negligence or
design, an order may be made that should not have been
made. The injured party's remedy is to have the order set
aside. An action for damages cannot be based on the
falsity of the proof of service. Nor, in my judgment, can
the adequacy of the efforts made to effect service be
subjected to a tortious duty of care."

And again at page 240:-

30 "I take this passage from Sir John Donaldson M.R.'s
judgment as supporting the view that I have endeavoured to
express, namely, that control of litigation and of the
various steps taken in prosecuting litigation lies in the
court and the rules and procedures that govern litigation
and cannot be sought via a tortious duty of care imposed
35 on one party for the benefit of the other.

40 This view is not, in my opinion, undermined but is
reinforced by the facts of the present case. Mr.
Martineau has submitted forcefully that the plaintiff has
been damnified, through no fault of its own, and that, on
the plaintiff's pleaded case, the damage would not have
happened had the second defendant exercised proper care in
ascertaining the correct address of the plaintiff's
45 registered office. All this I am prepared to accept. But
the damage of which the plaintiff complains was caused by
the legal process instituted by the second defendant and
by the winding up order made by the court. Damage of this
character is not, in my judgment, apt to be remediable in
50 an action based on tortious negligence.

In my judgment, there is no duty of care owed by one
litigant to another as to the manner in which the

litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort. I am therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out."

In one sense that seems to show that d'Allain v. de Gruchy would not have succeeded in England. And yet it did succeed here. It is not for me to decide whether or not d'Allain v. de Gruchy is good law. What Advocate Michel says is clear from the d'Allain case is that the sum of money given as damages was assessed by the Court as a result of the injury caused by the mistake of the Court in making the declaration. I cannot agree. It seems to me that d'Allain v. de Gruchy is no more and no less than an action in tort for damages caused by an abuse of the process of the Court.

In the American Second Restatement of the Law of Tort (1977) s 682 the principle of an abuse of process is stated thus:

"One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

Those words seem particularly apt but however I consider the matter, I can reach no other conclusion but that d'Allain was an unusual action which was founded in tort just as this action is founded in tort. It would in my view, be perverse to reach any other conclusion. The major problem that the Plaintiff faces is that the declaration was recalled on the 8th March, 1988 and the proceedings were commenced on 6th February, 1991. The désastre was declared on the 17th January, 1986. In my view, founded as it is in tort, the action is prescribed.

Authorities

- Digital Corporation v. Darkcrest Ltd [1984] 1 Ch. 512.
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