

COURT OF APPEAL

23.

30th January, 1996.

Before: Sir Godfray Le Quesne, Q.C., (President)
J.M. Collins, Esq., Q.C., and
R.C. Southwell, Esq., Q.C.

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

Applications by the Plaintiff for:

- (1) leave to appeal against the Order of the Royal Court of 5th October, 1995 - directing the Plaintiff to give the first, Second, Third, and Fourth Defendants specific discovery of the documents set out in paragraphs (i) to (vi) inclusive of the said Order, which application was refused by the Royal Court on 16th January, 1996; and
 - (2) if the leave sought in paragraph (1) above is granted, for a stay of the said Order pending determination of the said appeal.
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Advocate N.F. Journeaux for the Plaintiff.
Advocate M. St.J. O'Connell for the First, Second,
Third, and Fourth Defendants.

JUDGMENT.

5 THE PRESIDENT: An earlier application in this action was before this Court in the autumn of last year. In our Judgment of 24th November, 1995, we gave a summary of the background to the proceedings which we described as "*a course of international investment, company manipulation and resourceful accounting of labyrinthine complexity*". This course has now been unfolding for a number of years and it is not necessary, fortunately, to give more than a brief reference to certain features of it in order to explain the matter with which we have to deal today.

10 In the course of the story a company known as T.R. Technology Investment Trust was put into liquidation. Part of the assets of this company were taken over by the Eighth Defendant in the present action, originally known as Govett American Endeavour Fund Limited. The First, Second, Third and Fourth Defendants are the present directors of this Fund. When it was originally set up two companies of the Govett Group, which is a group of companies controlled by a Mr. Trueger, became respectively managers and investment consultants to the American Endeavour Fund. Mr. Trueger himself became a director of that Fund.

15 20 As I have said, the First to Fourth Defendants are the present directors of the Fund and it is the contention of the Plaintiffs that in that capacity they act on the suggestion or even under the control of the Hardie group of companies which is a group of companies in Australia.

25 30 After the setting up of the American Endeavour Fund, as the Govett American Endeavour Fund is now known, differences arose between the parties involved. The Plaintiffs contend that the First, Second, Third and Fourth Defendants procured the removal of Berkeley Govett International Limited, which had been appointed managers of the Fund. The Plaintiffs also contend that these four Defendants procured the removal of Mr. Trueger from the Board and indeed of all the other directors except themselves, and that they then caused the Fund to start legal proceedings against Mr. Trueger and certain Govett Companies in California.

35 40 On 17th May, 1995, the Plaintiffs, Pacific Investments Limited, were incorporated here in Jersey. They promptly acquired 4.96% of the shares in the Fund, which they hold, they say, as bare nominees for a Californian Company called KBLP VII Incorporated. KBLP, according to the Defendants, has close

connections with the Govett Group. At about the same time, a company of the Govett Group (London Pacific Life and Annuity Co.) lent to KBLP about US\$5,600,000, which was almost twice the value of the shares in the Fund acquired by the Plaintiffs as nominees.

5 On 26th May, 1995, only nine days after their incorporation, the Plaintiffs started the present proceedings. In these proceedings they allege that, since 1993, the First, Second, Third and Fourth Defendants have used improperly the fiduciary powers vested in them as directors of the Fund. They allege that they have used these powers to procure the removal of Berkeley Govett International as manager; to procure the retirement of Mr. Trueger and other directors of the Fund; to commence the proceedings in California to which I have referred, and for certain other purposes. The result, the Plaintiffs say, has been to expose the Fund to very serious liabilities and to jeopardise its assets. The relief which the Plaintiffs claim in the action includes, at present, the removal of these four directors from the Board. I say at present because there is pending an application for amendment of the Order of Justice which would remove this particular claim.

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30 The institution of the proceedings was followed by extensive interlocutory applications on both sides. In the course of these applications an affidavit was sworn by the First Defendant, Mr. Christensen, on behalf of himself and the Second, Third and Fourth Defendants. In the course of his affidavit, Mr. Christensen set out certain matters on the basis of which he said: "*It appears to me that KBLP VII Incorporated in effect takes its direction and control from the Govett Group. If that should be so and to the best of my belief all the evidence points that way, I suggest that these proceedings should be found by the Court to be an abuse of the process.*"

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40 The first four Defendants did in fact issue a summons to strike out the Order of Justice as an abuse of process on 21st July, 1995. This was followed on 18th September, 1995 by a summons issued by them in which they asked for disclosure of certain specific documents. It is necessary to observe what these documents are of which production is sought. They are:

45 (i) a copy of the application to the Financial Services Department of the States of Jersey for the incorporation of the Plaintiff.

50 (ii) a copy of such other documents in the possession custody or power of the Plaintiff and/or Centurion Trust Company Limited relating to the incorporation of the Plaintiff.

(iii) a copy of any security interest or other form of third party charge created by the Plaintiff, if any, over the shares in the Eighth Defendant registered in the name of the Plaintiff.

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(iv) a copy of the alleged charitable trust deed of which the Plaintiff claims the shares in KBLP VII Inc. are assets.

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(v) a copy of the most recent set of accounts, if any, of KBLP VII Inc.

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(vi) a copy of the loan agreement(s) or other document(s) evidencing the terms of the loan from London Pacific Life & Annuity Co. Ltd. to KBLP VII Inc. in the sum of \$5.6 million.

This matter came before the Royal Court on 5th October, 1995, when the Court ordered disclosure of the documents asked.

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On 16th January, 1996, the Plaintiffs applied to the Royal Court for leave to appeal, which was refused. Consequently the Plaintiffs now make their application to us for leave to appeal against the Order of 5th October, 1995.

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There is no doubt about the jurisdiction of the Royal Court to order discovery at an interlocutory stage. Following certain cases decided in England we so held in the Judgment which we delivered on the earlier application in this action to which I have already referred. However, we also made it clear in that Judgment that while such an order for discovery is within the jurisdiction of the Court, it is an order which should only rarely be made and only on the clearest possible demonstration that discovery at that stage is necessary for the fair disposal of an application before the Court.

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The Royal Court, bearing in mind what had been said in the English authorities later followed by this Court, exercised its discretion when dealing with the matter on 5th October, and exercised it in favour of the Defendants by ordering the discovery. There are well-established grounds on which alone it is open to this Court to interfere with the decision of the Royal Court based on such an exercise of discretion.

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Mr. Journeaux, who appears for the Plaintiffs, has put his application to us on one of those grounds only - that is on the ground that the decision of the Royal Court was plainly wrong. He has not contended that the Royal Court either took into account some matter which it should not have taken into account, or left out of consideration some matter which it ought to have included. He has argued only that the decision of the Court was plainly wrong, principally, if not entirely, for the reason that the Court

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failed, he says, to apply the principles to be derived from the decision in Broxton -v- McClelland (25th January, 1995) Unreported Judgment of the Court of Appeal of England.

5 Mr. Journeaux says that the Defendants' allegation is that the object of the action is to obtain some collateral advantage for the Govett Group. Relying upon the Broxton Judgment he argues that in order to make this good the Defendants must show that Govett, through the Plaintiffs, are seeking to obtain some
10 collateral advantage which could not properly be obtained in the action; but, Mr. Journeaux submits, the relief which is claimed is relief which is properly obtainable by his clients if they succeed in showing that, as shareholders, they have been unfairly treated by the directors. Therefore, he says, the relief is properly
15 obtainable in the action and, if the grant of the relief has consequences acceptable to Govett, that is their good fortune and no ground for denying the relief to the Plaintiffs.

20 I do not consider that it is necessary to decide whether Mr. Journeaux has given a correct account of the *ratio decidendi* of Broxton -v- McClelland. His interpretation of the Judgment is challenged by the Defendants, and I do not think it necessary to express any view between them.

25 The case of the Defendants here is that the Plaintiffs were set up by Govett and were provided with shares in the Fund for the simple purpose of complaining of unfair treatment. The Defendants say it was the purpose of Govett in setting up the Plaintiffs and providing them with these shares that the Plaintiffs should
30 complain of such unfair treatment and by doing so should obtain certain relief - the removal of the four directors - not because the Plaintiffs needed or desired it, but simply because such relief would operate for the benefit of Govett.

35 Quite independently of Broxton -v- McClelland, it appears to me that if this contention could be established it would at least constitute an arguable case that the action constitutes an abuse of the process of the Court.

40 Mr. Christensen's affidavit, while it may not go so far as to establish the case of the Defendants which I have just described - I say only 'may not' because it is possible that that question may have to be decided hereafter by the Royal Court - does, in my judgment, contain certain indications that the actions of the
45 Plaintiffs are not altogether independent of Govett and are designed for Govett's benefit. In my judgment, furthermore, the documents of which discovery has been sought and ordered are documents which are likely to throw light on the questions raised by this submission of the Defendants.

50 The Royal Court, as it appears to me, gave proper consideration to the questions before them and I certainly do not

consider that their decision can be characterised as obviously wrong.

5 On these grounds, it appears to me, that the application for
leave to appeal ought to be rejected. I should, however, like to
add two further points. The first is that this decision should
not be taken as any indication that discovery at an interlocutory
stage of an action is to be other than exceptional. I wish to
10 emphasise this because the fact that discovery has now been
ordered twice at interlocutory stages of the same action might
operate as a temptation to others conducting legal proceedings in
this jurisdiction to think that a Defendant's first act on being
served should be to take out a summons to strike out the Order of
Justice and then seek discovery in the hope of finding material to
15 support the striking out.

I wish to emphasise what we said in our Judgment of 24th
November, 1995 about the exceptional character of discovery at an
interlocutory stage and the heaviness of the burden which must be
20 discharged by those who apply for it. It is only necessary to
look at the facts of the present case to see that it is indeed a
thoroughly exceptional case and it is because of its thoroughly
exceptional character that these orders for discovery have been
made. The decision of the Court today refusing leave to appeal
25 from the Royal Court's Judgment must not be taken as any
indication that an Order for discovery at an interlocutory stage
is to become a normal feature, or indeed anything other than a
most unusual feature, of civil litigation.

30 The other point to which I wish to refer is a procedural
question which is of some importance in the work of this Court.
After the Royal Court had refused leave to appeal on 16th January
of this year, Mr. Journeaux asked the Court to stay the execution
of the Order for discovery until he could have time to make an
35 application to this Court for leave to appeal. The Royal Court
refused to do that, taking the view that, having refused leave to
appeal, they no longer had any jurisdiction to make any order,
even an order for a stay of execution.

40 The matter was the subject of some argument before the Royal
Court principally on the operation of Rules 15 and 16 of the Court
of Appeal (Civil) (Jersey) Rules, 1964. I do not think it would
be right to express any final view about this today because we
have not heard any argument on the point. I should like to say,
45 however, that, in my judgment, what was important when this
application was made was not Rules 15 and 16 of the Civil Appeal
Rules but the inherent jurisdiction of the Royal Court, whenever
it thinks proper, to order at what time relief which it has
granted is to be put into effect. That consideration does not
50 seem to have been presented to the Royal Court on 16th January.
In my judgment that was the critical consideration which should
have been put before the Court.

5 If a similar case arises in future in which the Royal Court
refuses leave to appeal from an interlocutory decision, and an
application is made for a stay pending an application to this
Court for leave to appeal, and the same view is taken by the Royal
Court as was taken on 16th January, it may become necessary for
this Court to give full consideration to the point and to
pronounce a definitive ruling on it. On the other hand, it may be
10 that if the inherent jurisdiction of the Royal Court is taken
properly into account a different result may follow. In my
judgment the present application must be refused.

COLLINS, J.A.: I agree.

15 SOUTHWELL, J.A.: I also agree.

Authorities.

Rome -v- Punjab National Bank (1989) 2 All ER 136.

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

Pacific Investments -v- Christensen (5th October, 1995) Jersey Unreported.

Pacific Investments Limited -v- Christensen (24th November, 1995) Jersey Unreported CofA.

Pacific Investments Limited -v- Christensen (16th January, 1996) Jersey Unreported.