

COURT OF APPEAL. 194

Judgment Reserved: 11th July, 1996;
Judgment delivered: 23rd October, 1996.

Before: J.M. Collins, Esq., Q.C., (President),
R.D. Harman, Esq., Q.C., and
Sir Peter Crill, K.B.E.

Between	Petrotrade	Representors
And	Independent Maritime Services, Ltd., David St. Clair Morgan, and Channel Islands and International Law Trust Company, Ltd.	Parties Convened

Appeal by the Parties Convened from the Order of the Royal Court (Samedi Division) of 8th April, 1994, whereby:

- (1) the dissolution of Independent Maritime Services Ltd. was declared void and the company reinstated; and
- (2) it was Ordered that a copy of the Representation of the Representors be served on David St. Clair Morgan and Channel Islands and International Law Trust Company, Ltd., and that they be summoned to appear before the court on that day.

In the matter of the Representation of Petrotrade Inc

<u>Between:</u>	Petrotrade Inc	<u>Representor</u>
<u>And:</u>	Channel Islands and International Law Trust Co. Limited	<u>First Respondent</u>
<u>And:</u>	David St. Clair Morgan	<u>Second Respondent</u>

Appeal by the Respondents from the Judgment of the Royal Court (Samedi Division) of 10th October, 1994, dismissing their appeal from the Order of the Judicial Greffier of 9th September, 1994, refusing their application to strike out the Representation on the grounds that it discloses no reasonable cause of action.

Advocate P.C. Sinel for Appellant Parties Convened.
Advocate M. Thompson for the Respondent Representor.

JUDGMENT

THE PRESIDENT: These two appeals concern a Jersey Company, Independent Maritime Services Ltd (the Company) incorporated on 9th February, 1984, and placed into voluntary liquidation on 29th September, 1993, pursuant to a special resolution passed by its shareholders and on the basis of a statement of solvency signed by its directors on 24th September, 1993. Dissolution followed immediately upon registration of the summary winding up under Article 150 of the Companies (Jersey) Law, 1991. Mr. David St. Clair Morgan, a director of Channel Islands and International Law Trust Company Ltd (the Trust Company), was appointed the liquidator of the Company. It appears that the Company's affairs had been administered by the Trust Company by means of Mr. Morgan. His two sons were the sole directors of the Company and it was the Trust Company of which he was a shareholder as well as director which presented the Declaration of Solvency signed by the two directors.

Petrotrade Inc (Petrotrade) is a company incorporated in the Cayman Islands which trades in crude oil and refined petroleum products. In April, 1994, Petrotrade presented a Representation to the Royal Court. I will return later to the matters alleged by Petrotrade in its Representation. The Representation is entitled simply and correctly: "In the matter of Independent Maritime Services Ltd and of the Companies (Jersey) Law, 1991" (the 1991 Law). By the Representation Petrotrade sought certain Orders and directions, which can be summarised as follows:

- (1) that the dissolution of the Company be declared void;
- (2) that Mr. Morgan be removed as liquidator of the Company;
- (3) that Mr. William Perchard of Coopers & Lybrand be appointed liquidator of the Company (with certain specified tasks for him to fulfil).
- (4) that (in addition to the Company itself) Mr. Morgan and the Trust Company be convened before the Royal Court in the matter of the Representation, so that the Court might confirm the Orders and directions set out in the Representation which included of course the Order for the dissolution of the Company.

On 8th April, 1994, Petrotrade applied *ex parte* to the Royal Court (the Deputy Bailiff, as he then was, and Jurats Vint and Gruchy). The Royal Court on that *ex parte* application (1) pursuant to Article 213 of the 1991 Law declared the dissolution of the Company to have been void and Ordered that the Company be reinstated; (2) adjourned further consideration of the Representation until 22nd April, 1994; (3) Ordered that a copy of the Representation be served on the Trust Company and Mr. Morgan and that they be summoned to appear before the Court on 22nd April, 1994. That Representation which was to be so considered contained of course the provision as to confirmation of the Orders made.

The hearing on the 22nd April was adjourned and the matter was thereafter placed on the pending list. No further action was taken under the Order itself which was unfortunate in that thereby the Trust Company and Mr. Morgan deprived themselves of the opportunity of seeking to persuade the Royal Court that it should refuse to confirm the Order for dissolution which it had made. Instead of taking this step, which in any event would have been open to them in seeking to set aside the Order of the Court made *ex parte*, they chose to treat the Order as a final Order by appealing against it and to seek to strike down the Representation on an application to strike it out. This has resulted in an elaboration of proceedings and delay which has proved unfortunate.

It was on 6th May, 1994, that the Company, Mr. Morgan and the Trust Company gave notice of appeal from the *ex parte* Order of 8th April, 1994, and this is one of the appeals now before this Court. This was followed on 15th June, 1994, by the issue of a summons by the present Appellants to strike out Petrotrade's Representation, or to stay it pending the outcome of the appeal against the Order of the 8th April, 1994. The summons was amended on 22nd July, 1994. Neither the appeal nor the application was successful. On 29th July, 1994, the Judicial Greffier ordered that the Representation should not be struck out or stayed for the reasons set out in his judgment of 9th September, 1994.

On 8th August, 1994, the Judicial Greffier heard a summons by Petrotrade seeking an Order that the Representation be heard at an early date and that directions be given for the service of pleadings, the giving of discovery and other matters. The Judicial Greffier ordered that the Representation be set down for hearing and that discovery be given. He dealt with these matters also in his judgment of 9th September, 1994. These directions were later stayed by the Royal Court.

On 17th August, 1994, the Appellants by two summonses appealed against both Orders of the Judicial Greffier of 29th July and 8th August, 1994. The appeal against the Order of 29th July, 1994, was heard by the Lieutenant Bailiff sitting alone. By an Order of 10th October, 1994, he dismissed the appeal against the

Judicial Greffier's Order of 29th July, 1994, and held that the Representation did disclose a reasonable cause of action. The appeal against the Order of 8th August, 1994, was heard before the Lieutenant Bailiff and Jurats. By an Order of 11th October, 1994, they stayed the operation of the Judicial Greffier's Order of 8th August, 1994, pending the outcome of the existing appeal against the *ex parte* Representation of 8th April, 1994, and of the then intended appeal against the Order of 10th October, 1994. On 4th November, 1994, the Trust Company and Mr. Morgan gave notice of appeal to this Court against the Order of 10th October, 1994, by which the application to strike out the Representation had been dismissed.

Thus two appeals come to this Court, one from the Lieutenant Bailiff's dismissal of the appeal from the Judicial Greffier's decision not to strike out the Representation and the other from the Order made on the Representation.

Having treated the Order of the 8th April, 1994, as a final Order by appealing against it, there would seem to me to be some difficulties in the Appellant's way in now seeking to strike out the pleading on which it was based. However that may be, the application was dealt with on its merits by the Judicial Greffier and the Lieutenant Bailiff and we have heard full argument upon it, in the knowledge that there is considerable overlap between the two appeals that are before us.

In the case of the appeal against the making of the Order the Appellants first contend that the Order should not have been made *ex parte*.

Article 150(1) of the Companies (Jersey) Law, 1991, provides as follows:-

"(1) On the registration by the registrar of a statement delivered under Article 146 that the company has no assets and no liabilities the company is dissolved".

Then by Article 213 provision is made in the following terms for the power of the Court to declare dissolution of the Company void:

"(1) Where a company has been dissolved under this Law, the Désastre Law or the Laws repealed by Article 223, the court may at any time within 10 years of the date of the dissolution, on an application made for the purpose by a liquidator of the company or by any other person appearing to the court to be interested, make an Order, on such terms as the court thinks fit, declaring the dissolution to have been void and the court may by

5 *the Order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved".*

10 No procedure has been provided for in the Royal Court Civil Rules or elsewhere under which such an application as is provided for under Article 213 is to be made. In those circumstances the most appropriate instrument according to Jersey practice is the Representation and it was this instrument which was chosen by Petrotrade. The Representation was set out in full in the Act of Court of the 8th April, 1994, and formed the basis of the Orders made thereby.

15 By the Notice of Appeal against that Order one of the three grounds of appeal reads as follows:-

20 *"1. That the decision to reinstate (the Company) was made ex parte and as such constitute a breach of natural justice".*

25 While in Jersey it is settled practice for applications to be made *ex parte* to the Samedi Division of the Royal Court on its Friday sittings, these are usually applications made by or with the concurrence of the Registrar of Companies.

30 We can see no reason why applications of the present nature should not likewise be made *ex parte*, always bearing in mind that the Royal Court has a discretion to direct that they be heard *inter partes* or that the matter be adjourned for further consideration of the Representation and any Order made *ex parte*. We also take the opportunity to state that it should be incumbent on the Advocate seeking an *ex parte* remedy to inform the Court of any factor making it desirable to adjourn the matter without making an Order so that the hearing could be *inter partes*. We see no reason why otherwise the Royal Court should not follow the practice in the English Courts as described by Hoffman LJ (as he then was) in Stanhope Pension Trust & Anor. -v- Registrar of Companies & Anor. [1994] BCLC 628 at 635(h):

45 *"As Harman J remarked in Re Portafram Ltd [1986] BCLC 533 at 534 such applications are usually to all intents and purposes ex parte. The Registrar of Companies, who appears by counsel instructed by the Treasury Solicitor, will assist the court on whether the requirements of the section have been satisfied but has no interest except in securing the Registrar's costs. The making of the Order does not determine whether the applicant has a claim against the company or the company has a claim against a third party. As I have already said, all that is required is that the claim should not be merely*

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shadowy. It therefore seems to me that a third party who merely wants to say that the applicant has no claim against the company or that the proceedings which the revived company proposes to bring against him have no prospect of success should not be entitled to intervene in the application".

We further notice that the application in In Re Roehampton Swimming Pool Ltd (1968) 1 WLR 1693 was made and heard *ex parte*; while it failed, no point appears to have been made by Megarry J (as he then was) on this procedure. Indeed at p.1696 we find the following observations by the Judge:-

"The phrase used by section 352 is "any other person who appears to the court to be interested". It seems to me that the words "who appears to the court to be" are words which merely relax the standards of proof somewhat, allowing the court to act on *prima facie* evidence in cases which will usually be in substance brought *ex parte*. In other words, I think the phrase as a whole bears much the same meaning as "a person appearing to the court to be a person interested"; and on the phrase "person interested" there are many authorities, as may be seen from the entries under that phrase and under the word "interested" in *Stroud's Judicial Dictionary* (3rd ed. 1953) and *Burrows' Words and Phrases Judicially Defined* (1944), and their supplements".

In the light of this collection of the observations by Harman J, Hoffman LJ (as he then was) and Megarry J (as he then was) we are not impressed by the reliance on behalf of the Appellants of passages taken from *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* (2nd Ed'n) Vol. 10. As I have already mentioned, the proper course was for the Appellants to seek to set aside the *ex parte* Order either by taking up the application ordered by the Court (on any adjourned date) or by a summons to set aside an *ex parte* Order within the inherent jurisdiction of the Court. The terms of the Representation and the acceptance by its terms as incorporated into the Act of Court it clear that the Order was subject to confirmation.

In these circumstances, I would dismiss the Appellants' contentions that the Order should not have been made *ex parte* or that there was a breach of natural justice. I am, for my part, further satisfied that notice was given to the relevant public authorities, this being the appropriate course in this Island and there being no need in normal circumstances to notify the Attorney General. It is further to be observed that a third party (including a person against whom it is intended that the restored Company should be able to claim) has, save in exceptional circumstances, no *locus standi* to intervene in the application.

There may be circumstances in which the Royal Court may consider it appropriate to notify the liquidator of the dissolved Company, but we do not consider this to be the case in circumstances in which he may himself be concerned in the matters which have led to the application to dissolve and are the subject at least of suspicion. Our attention was drawn to the exchange of correspondence between Petrotrade's solicitors and the liquidator which we find dispels any grounds for criticism of the decision to commence proceedings *ex parte*.

The second contention, common to the appeal against the Order of 8th April, 1994, and to the appeal against the refusal to strike out the Representation, is that the Representation did not show that Petrotrade was a "person appearing to the Court to be interested".

The relevant terms of the Representation are as follows:

- "1. Petrotrade Inc ("Petrotrade") is a company incorporated according to the laws of the Cayman Islands which carries on business as a trader in crude oil and refined petroleum products.
2. Independent Maritime Services ("the Company") was a company incorporated in Jersey on 9th February, 1984, which was dissolved on 29th September, 1993, pursuant to a Special Resolution passed by its shareholders and pursuant to a statement of solvency signed by the directors of the Company on 24th September, 1993.
3. At all material times one Clive Stafford Smith ("Mr. Smith") was employed as head of the operations department of the Oil Broking Division of International Maritime Services Co Ltd ("IMS") until 1st April, 1992, and thereafter until 13th September, 1993, by E.P. Services S.A. ("EPS").
4. In that capacity Mr. Smith was responsible for negotiating through shipbrokers the chartering of vessels required by Petrotrade for the transportation of crude oil and refined petroleum products and for carrying out the operational aspects in connection with the performance of the said charters including the arrangements for the appointment of port agents for the vessels chartered to Petrotrade. A port agent is an agent appointed by the owners and/or the charterers of a vessel to represent the vessel's interests in a particular port. Its fees are paid by the owner. It is a common practice in the port of Antwerp and some other ports for such agents to pay a rebate on the agency fee received from the vessel's owners to the party responsible for their appointment

as port agent, as a means of inducing future such appointments. All these activities were carried on by the said Operations Department in its capacity as agents of Petrotrade.

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5. It is also a common practice in the fixing of charters for vessel owners to pay "address commissions" to charters. An address commission is a payment back to the charterer by the owner of the vessel which has been chartered which takes effect as a form of reduction or discount in the charter rate. Address commissions were due to Petrotrade on all vessels chartered by it.
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6. On 3rd September, 1993, Petrotrade discovered that Mr. Smith had failed to account to Petrotrade or its agents in Geneva for large amounts in respect of address commissions. The matter was referred to the English police and Mr. Smith was arrested in England on 7th September, 1993. Proceedings were commenced in the Commercial Court of the High Court of Justice Queens Bench Division on 24th September, 1993, and a worldwide mareva injunction granted. Proceedings were also commenced in Switzerland and Mr. Smith's premises in Switzerland were searched.
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7. As a result of the worldwide mareva injunction, Mr. Smith was required to swear an Affidavit disclosing the full value of his assets within and without the jurisdiction identifying the nature of such assets and their whereabouts. As part of that Affidavit, Mr. Smith was further required to disclose what had become of monies paid into an account at National Westminster Bank plc in Jersey represented port agent commissions.
8. On 17th September, 1993, Petrotrade also discovered that Mr. Smith had received certain port agent commissions from a company known as Petrain Limited. Petrain Limited is a ship broker. A ship broker arranges the chartering of vessels. As a result of further enquiries, Petrotrade discovered that a proportion of port agent rebates due to Petrotrade from a company known as Cisalpina N.V. ("Cisalpina") were paid to the Company pursuant to invoices issued in the name of the Company. To the best of Petrotrade's knowledge, payments totalling BFR 5,273,119 were made to the Company's account at Barclays Bank between the period 1st August, 1991, to 10th September, 1993, by Cisalpina. From this account Belgian Francs 4,684,448 were transferred by or by Order of the Company to the account of Mr.

Smith at National Westminster Bank in Jersey. In answer to interrogatories given by Mr. Smith in the English proceedings on 22nd March, 1994, Mr. Smith has stated that the monies paid by Cisalpina to the Company were paid as a result of an informal arrangement between himself and "Alpina", which is understood to be a reference to Cisalpina. Petrotrade avers that such an arrangement is in breach of Mr. Smith's duty as an employee and an agent.

9. The invoices issued on behalf of the Company in respect of port agents commissions bear the reference "DSTCM". Petrotrade avers that this reference is the reference of David St. Clair Morgan, a director of the Company and the individual appointed liquidator of the Company. David St. Clair Morgan is a director and employee of Channel Islands and International Law Trust Co. Ltd ("the Trust Company").

10. By reason of the above matters, Petrotrade considers that the Company may have been used to receive secret commissions due to inter alia Mr. Smith and which otherwise belong to Petrotrade.

11. The Company was placed into members voluntary liquidation and dissolved on 29th September, 1993. Petrotrade believes that the Company may have been placed into liquidation and dissolved in an attempt to frustrate any possible claim from Petrotrade.

Particulars of averment

(a) Mr. Smith was arrested on 7th September, 1993.

(b) Mr. Smith's apartment in Geneva was searched on 16th September, 1993.

(c) A worldwide Mareva injunction was granted on 24th September, 1993.

(d) The involvement of David St. Clair Morgan in the issuing of invoices of the Company as pleaded at paragraph 9 above.

Any consideration of the adequacy of the Representation should be prefaced by an analysis of its nature. It is not an Order of Justice making allegations against the Appellants or any one else by way of raising or alleging a cause of action against them. It is not the equivalent of an Order of Justice in Jersey or a Writ and Statement of Claim in England. Thus it is in my judgment no criticism of the Representation to argue (as do the

Appellants) that the Representor "fails to allege facts which if true would (a) entitle the Representor to proprietary or pecuniary relief or (b) constitutes a cause of action reasonable or otherwise". Likewise the contention that the Trust Company was improperly convened in that no relief was sought against it and no cause of action alleged against it is, in my view, misconceived.

The purpose of the Representation is not to allege a cause or causes of action; it is simply to lay an arguable basis for the making of the Orders sought. It follows that whereas a Representation may be open to attack in appropriate circumstances as scandalous or an abuse of the process of the Court it can never be open to attack on the ground that it does not disclose a reasonable cause of action.

All that the Representation needs to show is:-

(1) that Petrotrade has arguably a sufficient interest for the purpose of Article 213 of the 1991 Law, which, in this case, needs to be an interest in recovering moneys which arguably belong to Petrotrade and which the Company arguably has received, in whole or in part, or in respect of which the Company arguably owes a debt to Petrotrade;

(2) that accordingly the Company arguably should not have been dissolved and should be restored to personality so that the position as between Petrotrade and the Company i.e. the questions whether (a) the Company has received money which it holds in trust for Petrotrade, or (b) Petrotrade is a creditor or the Company can be resolved.

Guidance as to the matters to be borne in mind in approaching applications of the sort which are in point in this appeal is to be found in a number of authorities in England. In Re Test Holdings (Clifton) Ltd [1970] Ch. 285; [1969] 3 All ER 517 the expression "*other person who appears to the Court to be interested*" was described as "*a phrase of great amplitude*". In the Roehampton Swimming Pool case (above) at p.1696, Megarry J held that the words "*'who appears to the Court to be' are words which merely relax the standards of proof somewhat, allowing the Court to act on prima facie evidence ...*" In other words I think the phrase as a whole bears much the same meaning as "a person appearing to the Court to be a person interested", a phrase as to which there were the numerous authorities to which the Judge referred.

In Re Wood and Martin (Bricklaying Contractors) Ltd (1971) 1 All ER 732 it was held by the same Judge that it was sufficient if the person claiming to be "a person interested" had a more than

shadowy interest in the Company. *"It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail; provided it is not merely shadowy I think it suffices for the purpose of s.352".*

5 Finally, in the Stanhope Pension Trust case (above) Hoffman LJ at p.635 quoted the words of Megarry J in the Re Wood and Martin case with regard to the interest of the applicant *"It is sufficient"* said Hoffman LJ *"that it (the interest) is not "merely shadowy"..."* Bearing in mind that the Representation rehearses the employment of the Applicants' servant Smith, the receipt of monies into his account in Jersey through the medium of the Company to which the Applicants have an apparent claim on the face of it and the coincidence of the speedy liquidation of the Company once Smith had been arrested I, for my part, find it impossible to see the case in any other way than that Petrotrade are persons interested for the purpose of Article 213 of the Companies Law of 1991. Accordingly, whether by way of appeal or by way of the ill-advised application to strike out I would affirm the Order of the 8th April, 1994, and dismiss the appeal and application in that regard.

25 Finally, I turn to the decision of the Royal Court to convene both the Liquidator and the Trust Company. Once again, the Appellants have failed to understand the nature of a Representation of this kind. It was urged upon us that no cause of action was pleaded against the Trust Company, or for that matter the Liquidator. I conclude that once the Royal Court had decided rightly to order the dissolution to be void in the terms described above it was a matter of discretion for the Court to determine what party if any should be convened. In order to examine this discretion the Royal Court was entitled to look beyond the terms of the Representation and to have regard to the affidavit evidence before it. Not only was the Company administered by the Trust Company, but also it appears from the Jordan's Company search of the 10th December, 1993, that the statement of solvency, on which the liquidation and dissolution of the Company followed, was presented by the Trust Company and bore Mr. Morgan's initials.

40 Much was made in argument of that part of the Representation which requested the removal of Mr. Morgan and his replacement by other liquidators. I find this to be a proper request to be made having regard to Mr. Morgan's personal position, having issued the invoices against which the payments complained of were made, and being the father of the two directors of the Company. I say no more, since I do not wish to prejudice the decision of the Royal Court when the matter comes back to them to determine the matters left over by them under the Order of the 8th April, 1994. I would dismiss the appeal against the Order of the 8th April, 1994, and the appeals against the decision of the Royal Court on the striking out application. Accordingly, I direct that the

5 following should take place forthwith. First, that the hearing
adjourned on the 22nd April, 1994, and thereafter placed on the
pending list be reinstated as soon as the Royal Court can
accommodate it, that secondly the Representation be set down for
hearing and discovery be given as Ordered by the Judicial Greffier
on the 8th August, 1994.

10 Finally, I wish to express my disapproval of the immensely
tortuous nature of the procedure adopted by the Appellants whereby
this matter has come to the Court on two associated but
inconsistent appeals over two years after the Order complained of.
Jersey is an important financial centre and it is an essential
component in the maintenance of that position that commercial
proceedings are conducted speedily and efficiently in the
15 interests of justice.

HARMAN J.A.: I agree.

CRILL J.A. : I agree.

Authorities

- Companies (Jersey) Law 1991: Articles 144-186, 213.
- In Re Roehampton Swimming Pool Ltd [1968] 1 WLR 1693.
- Re Wood & Martin (Bricklaying Contractors Ltd) [1971] 1 All ER 732.
- Pitman -v- Top Business Systems [1984] BCLC 593.
- In re D.P.R. Futures (1989) 1 WLR 778-792.
- Stanhope Pension Trust Ltd & Anor. -v- Registrar of Companies & Anor. [1994] 1 BCLC 628.
- In re North Brazilian Sugar Factories (1888) 37 Ch. 83-88.
- Re Keypak Homecare Ltd [1987] BCLC 409.
- Re Vickers & Bott Ltd [1968] 2 All ER 264.
- R.S.C. (1995 Ed'n) O.18/19/3.
- Drummond-Jackson -v- BMA [1970] 1 WLR 688 CA.
- Dicey & Morris: "The Conflict of Laws" (12th Ed'n): Chapter 35.
- Re: Mixhurst Ltd [1994] 2 BCLC 20.
- Atkin's Encyclopaedia of Court Forms in Civil Proceedings (2nd Ed'n) Vol. 10: pp.275 & 610.
- Re M. Belmont & Co Ltd [1951] 2 All ER 898.
- Ex Parte* Representation of Glendale Hotel Holdings Ltd (14th July, 1994) Jersey Unreported CofA.
- Cutner -v- Trustees of Marc Bolan Charitable Trust (1980) JJ 269 CofA.
- Picot -v- Crills (17th February, 1995) Jersey Unreported CofA.
- Royal Brunei Airlines Sdn Bhd -v- Tan [1995] 3 All ER 97 PC.
- Kemp & Ors. -v- Meditco (23rd August, 1995) Jersey Unreported.
- Re Test Holdings (Clifton) Ltd [1970] Ch. 285; [1969] 3 All ER 517.