

ROYAL COURT
(Samedi Division)

145.

25th July, 1997.

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
sitting alone

Between:	The American Endeavour Fund Ltd	Plaintiff
And:	Arthur I. Trueger	First Defendant
And:	Berkeley International Capital Corporation (A California Corporation)	Second Defendant
And:	London Pacific Group Ltd (formerly known as Govett & Co Ltd)	Third Defendant
And:	London Pacific International Ltd (formerly known as Berkeley Govett International Ltd)	Fourth Defendant
And:	James Hardie Industries Ltd	First Third Party
And:	Firmandale Investments Ltd	Second Third Party
And:	Robert A. Christensen	Third Third Party
And:	Alison Mary Holland	Fourth Third Party
	(by original action)	

AND

Between:	Berkeley International Capital Corporation (A California Corporation)	First Plaintiff
And:	London Pacific Group Ltd (formerly known as Govett & Co Ltd)	Second Plaintiff
And:	London Pacific International Ltd (formerly known as Berkeley Govett International Ltd)	Third Plaintiff
And:	The American Endeavour Fund Ltd	First Defendant
And:	James Hardie Industries Ltd	Second Defendant
And:	James Hardie Finance Ltd	Third Defendant

And:	Firmandale Investments Ltd	Fourth Defendant
And:	Michael G. Allardice	Fifth Defendant
And:	Robert A. Christensen	Sixth Defendant
And:	Graeme A. Elliott	Seventh Defendant
And:	Alison Mary Holland	Eighth Defendant
And:	Volaw Trust & Corporate Services Ltd	Ninth Defendant

(by way of counterclaim)

Application by the Plaintiff in the original action: (1) for an Order that the action be set down for hearing and that a trial date be fixed; and (2) for the Court to give such other directions as it sees fit in connection with arrangements for the trial.

Order made on a summons relative to the management by the Court of the action.

Advocate W.J. Bailhache for the Plaintiff and the Second, Third, and Fourth Third Parties in the original action; and for the First, Fifth, Sixth, Seventh, and Eighth Defendants in the Counterclaim.

Advocate J.G. White for the First, Second, Third and Fourth Defendants in the original action; and for the First, Second, and Third Plaintiffs in the Counterclaim.

Advocate A.D. Robinson for the First Third Party in the original action; and for the Second, Third and Fourth Defendants in the counterclaim.

Advocate N. Pearmain for the Ninth Defendant in the counterclaim.

JUDGMENT

LIEUTENANT BAILLIFF: This is an application by which Mr. Bailhache for the plaintiff asks for the case to be set down and a trial date fixed, coupled with a general request for directions.

5 More specifically, he asked:

1. that the case be set down for hearing;
2. that a date - which he suggested should be 26th April, 1999 - be
10 fixed for the trial;
3. that the Court should conduct quarterly reviews; and

4. that there should be a pre-trial review by the Judge appointed to hear the action six to nine months prior to the hearing date.

5 The position so far reached is this: discovery has been ordered to
be completed by 31st August, 1997. Once this has been completed, the
plaintiff will seek to amend his Order of Justice as ordered previously
on 15th May, 1997. The plaintiff has given an indication of the
10 amendments which he is likely to seek (on a non-binding basis). The
plaintiff anticipates that he will be able to do this - that is to serve
his amended Order of Justice - by 31st October, 1997. The plaintiff
seeks particulars of the counterclaim but has so far not done so.

15 The RICO proceedings (in the Federal Courts of the United States of
America) where an appeal court found (in favour of the plaintiffs) that
the Federal Courts would hear their action is presently subject to an
appeal by way of an "en banc" review, which may, subject to leave being
given, be subject to an appeal to the Supreme Court. The Fund wishes to
20 proceed here and is, in any event given the circumstances, entitled to
do so. The Court accepts this view.

Mr. Bailhache submitted that a date for the trial should be fixed
now for a variety of reasons.

25 First, the Fund was due to be wound up in September, 1999, there
were substantial unconnected shareholders and the present bank loans
would fall due for payment which might cause the guarantor, James
Hardie, to honour its guarantee.

30 Second, by May, 1999, the action would have been running for three
years and things must move forward.

35 Third, the case should go to trial as soon as it can be heard
fairly. Although normally the interlocutory applications should be
heard first, here, where things were not so simple, a trial date should
be fixed to force the parties to focus on the preliminary issues.

40 Delay might well defeat the requirements of justice, and the Court
might well need to make arbitrary orders.

45 The Court had a discretion as to whether it would enforce limits,
and would be in no better state to fix a trial date after the close of
pleadings than it is now, as it would not then know what witnesses would
be required, a position which would not materially alter even after the
"1782" applications and the taking of evidence under the Hague
convention.

50 Further, there were practical reasons for fixing a date now. There
would be need for an external Judge, a court room, no doubt a training
course for computers and screens, and accommodation amongst other
factors. Although his view was that the hearing would take six months,
he subsequently conceded that it could last for longer, although a
generous estimate would be fifteen months. To get this organised for
May 1999, the Court should be making arrangements now.

55 All this led to the conclusion that the trial should take place at
the earliest date that the parties can be ready. Taken as a whole this
was a case where there is special reason for a date to be fixed early
on.

Having dealt at length, and most helpfully, with the practice in England, Mr. Bailhache went on to make a series of specific submissions:

5 First, his amended Order of Justice should be ready by 31st October, 1997.

10 Second, although he either may or will seek particulars of the defendants' answer and counterclaim, none have so far been sought. He could do this by 31st August, 1997.

In due course, notices to admit and interrogatories would be served.

15 In all the circumstances the best way for the Court to manage the case was by a regular three monthly review, until the case was handed over to the trial Judge for his review six to nine months before the trial.

20 Third, the discovery of the California Court proceedings which had been made by 30th June was not satisfactory as what the Court understands to be the image ID field is missing. This was raised at the end of the first day but not pursued on the second.

25 So far as any timetable could be produced, he agreed that it was necessary but that it should be fixed after the amended Order of Justice was produced.

30 His submission was supported by counsel both for James Hardie and for Volaw.

35 Mr. White agreed that the Court had a discretion to give such directions as were appropriate, although he quite properly submitted that the Royal Court Rules should be followed save in exceptional circumstances (v. Rule 6/21).

40 Directions for setting down and fixing the date of the trial were quite distinct operations, although he accepted, again quite properly, that a date may be fixed before all the steps had been complied with. However, in this case, it would be premature to do so. If a date were fixed it ought to be achievable. This was not now possible as the Court had insufficient information before it to permit it reasonably to do so.

45 In his view, to do as Mr. Bailhache had suggested would be to work back from the date of the trial, rather than to work forwards towards it, and in furtherance of this view, suggested a timetable and sequence of events which the Court might consider.

50 In support, he submitted that discovery and particulars apart:

First, there might well be arguments over the amendments sought by Mr. Bailhache to the Order of Justice, particularly (but not limited to that) on issues of prescription.

55 Second, although the counterclaim stands on its own, the answer might well be substantially revised, and this in turn might lead to the plaintiff revising its reply.

He then went on to make a series of points relative to discovery and the number of witnesses which were set out in detail in his form 2, which the Court does not need to repeat in detail.

5 In all, the Court does not have sufficient information to assess the length of the hearing, nor when the very serious allegations made can properly be brought to trial and the defence heard out; while the cost and inconvenience of changing the date made it more than ever essential for the Court to have a fair idea - which it cannot have now -
10 on these issues.

Last, a trial in May, 1999, would in any event, on any calculation, extend beyond the life of the Fund.

15 In reply, Mr. Bailhache reiterated his concern that the defendants were seeking to exploit different jurisdictions to obtain delays.

(The trial, in the interests of justice, should not be delayed. The Court should earmark a date, and here should take a pro-active view, and
20 allow neither the case nor the interlocutory proceedings to drag on, with the plaintiff unable to make progress.

On the timetable proposed by Mr. White he made a series of points.

25 First, it would be wrong to require all requests for specific discovery to be made by 31st October.

30 Second, why should consideration of an amended Order of Justice of necessity wait until 1st December if it can be served earlier than 31st October.

35 Third, given the plaintiffs' difficulties in 1999, could not the Court at least earmark a date, and if it did not accede to his present application at least stand it over.

(Fourth, would the Court in any event please make enquiries as to the provision of a Judge, Court and other accommodation (including storage space), computers, stenographers and indeed all the necessary factors for hearing the case.
40

45 Clearly, the Court must assist the parties to bring forward the litigation to trial in a manner which is fair to the parties. This inevitably requires a balancing exercise. In the view of the Court it is premature either to set the case down or to fix a date.

To do the latter would involve working back from it rather than working towards it. Although it is accepted that the Court has a discretion to do so, there are still far too many variables for it to be in any way safe or proper to make any such order.
50

In the view of the Court, the best way to manage the case is to make an order on the lines proposed by Mr. White, though with some variations.

55 The Court therefore orders that:

1. The plaintiff shall serve any request for further and better particulars of the counterclaim before 31st August, 1997.

2. Any request by the plaintiff for further and better particulars of the answer (which may be amended) may stand over until further order.

5 3. Either party shall be at liberty to issue a summons or summonses for specific discovery before 31st October, 1997, such summons or summonses to be returnable on 1st December, 1997, this without limiting further summonses thereafter.

10 4. The summons for the amendment of the Order of Justice shall be served prior to 31st October, 1997, returnable one month following service or at the latest on 1st December, 1997.

15 5. The summons of the defendants to strike out specific parts of the reply shall be stood over until further order.

20 6. The hearing commencing on 1st December, 1997, will, without being limited solely to these issues, hear any argument relating to the summonses in paragraphs 1, 3 and 4 (should 4 not have been taken earlier). Skeleton arguments are to be exchanged two working days prior to the hearing (or hearings).

25 In passing, the Court notes that the defendants have advised that they may, apart from any other issues, wish to raise issues relating to prescription which may arise on any amended Order of Justice.

30 7. Following the making of orders at this hearing the Court, for the guidance of the parties, envisages that it will make orders relating to a timetable for any amended pleadings, notices to admit and interrogatories, and will fix a further date at that hearing for hearing applications for the grant of letters rogatory.

35 8. For the further guidance of the parties, it is envisaged that at this further hearing the Court will have sufficient information before it to set the case down, fix a trial date and deal with any ancillary matters which may arise, including but not limited to orders relating to expert evidence, lists of witnesses and a pre-trial review by the Judge who will preside.

40 9. The present summons will be stood over until 1st December when Mr. Bailhache may raise it again if he so wishes.

45 10. There will be general liberty to apply.

Finally, the Court, through the Greffier, will put in train the necessary enquiries for the finding of a Judge, suitable accommodation and the various ancillary matters raised by counsel.

50 Meanwhile counsel should, without delay, advise the Greffier as to what they see as being their requirements.

Authorities

- RSC (1997 Ed'n) Vol 1: pp.1264-96 [104-137]; Ord. 25 (summons for directions).
Vol 2: pp.226-31: Practice Direction (Civil Litigation: Case Management) [1995] 1 WLR 262.
- Mayo Associates & Ors. -v- Young & Ors. (1995) JLR 254.
- Royal Court Rules 1992 (as amended): Rules 6/21-22.
- Govett American Endeavour Fund Ltd -v- Trueger & Ors. United States Court of Appeals for the 9th Circuit: Judgment No. 95-16498.
- Govett & Co Ltd -v- Alison Holland et al (23rd October, 1995) California Superior Court (San Francisco) Department No. 17: Judgment No. 968068.
- Practice Direction 96/1; 92/2.
- In re Mayo (8th December, 1995) Jersey Unreported.
- Beghins Shoes Ltd & Island Gift Shops Ltd -v- Avancement Ltd (24th April, 1995) Jersey Unreported.
- Lee & Ors. -v- Bromley & Ors. (13th November, 1995) Jersey Unreported.
- Hambros Bank (Jersey) Ltd -v- David Eves (8th September, 1995) Jersey Unreported.
- David Eves -v- Hambros Bank (Jersey) Ltd (18th December, 1995) Jersey Unreported Privy Council.
- Pirunico Trustees (Jersey) Ltd -v- Jefferson Seal Ltd (2nd December, 1996) Jersey Unreported.
- Pirunico Trustees (Jersey) Ltd -v- Jefferson Seal Ltd (6th January, 1997) Jersey Unreported.
- Fort -v- Le Claire (22nd September, 1994) Jersey Unreported.
- Finance & Economics -v- Bastion Offshore Trust Co Ltd (9th October, 1991) Jersey Unreported CofA.
- Jackson -v- Jackson (1965) JJ 463.