10 December, 1987.

209.

87/77

In the Royal Court of Jersey

Before Mr. V. A. Tomes, Deputy Bailiff

Jurat H. Perrée

Jurat J. J. M. Orchard

Between:	JOBAS LIMITED	Plaintiff
And:	ANGLO COINS LIMITED	First Defendant

Advocate J. G. White for Plaintiff

The Viscount for the First Defendant (en désastre)

On the 26th October, 1987, the Court sat to hear two summonses, the first being an application of the Plaintiff that the hearing of the action between the two parties and Charterhouse Japhet (Jersey) Limited, second defendant, and R. H. Takari and others, third to fifteenth defendants inclusive, and Henry Joseph Agutter (now deceased) and Basil Bayliss, third parties, should be adjourned to a new date and that the costs of the application and all costs incurred and thrown away as a consequence of the adjournment should be paid by the Viscount, as Administrator in Bankruptcy of the first defendant, on a full indemnity basis, and the second being an application by the Viscount, Administrator in Bankruptcy of the first defendant, for an order that he should be permitted to amend and/or re-amend the answer of the first defendant and that the costs of the application should be paid by the plaintiff on a full indemnity basis.

By consent, the Court made an order for the adjournment of the action. The other matters were argued and adjourned.

On the 5th November, 1987, the Court made a further consent order in the following terms:-

"1. By consent the First Defendant shall have leave to file a re-amended Answer.

2. By consent the Plaintiff shall have leave to file an amended Reply within 21 days of the date hereof.

3. That the costs incurred in connection with both amendments and the adjournment shall be determined by the Court, the parties having agreed that the Court shall have a general discretion in this regard which is not limited by any agreement entered into by the parties.

4. The Plaintiff reserves its right to apply to have any part of the re-amended Answer struck out if it is of the opinion that it contravenes Rule 6/13 of the Royal Court Rules.

5. The Viscount as Administrator in Bankruptcy of the First Defendant reserves the right to seek leave to further amend the First Defendant's Answer by reason of the fact that he is of the opinion that further amendments are necessary following

(a) an application by the Plaintiff under Rule 6/13 of the Royal Court Rules or

(b) further information which comes into his possession".

The parties went on to argue the question of costs in pursuance of paragraph 3 of the agreed order, throughout a day-long hearing. On the 6th November, 1987, the Court ordered that the costs incurred in connection with both the adjournment and the amendment shall be costs in the cause. The

Court gave a brief summary of its reasons but said that it would give its reasons fully in writing at a later date, both parties having leave to appeal, with the time for appealing to run from the date of the Court's written judgment.

The parties agreed that the Court had a general discretion on the question of costs. Mr. White sought to persuade the Court that it should, in exercising that general discretion, be guided by strict principles that have been laid down by the Courts in England.

These are firstly that the party responsible for the adjournment, usually, but in this case not, the applicant, will pay the costs of the application and "all costs incurred and which will be thrown away in consequence thereof". (v. Burgoine v Taylor (1878) 47 L.J. Ch. 542 p 543).

Similarly, with an amendment, leave to amend will almost always be granted, subject to the payment of costs. Bramwell L.J., in Tildesley v Harper (1878) 10 Ch.D.393 said, in the third line of his oft-quoted judgment:-

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise".

Then a little further on, at the end of his judgment, he said, (at p397):-

"It is quite right that the rules of court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties".

In Associated Leisure Ltd. and Others - v - Associated Newspapers Ltd. (1970) 2 All ER 754 at p757, Lord Denning M.R. said:-

> "I start with the principle, well settled, that an amendment ought to be allowed, even if it comes late, if it is necessary to do justice between the parties, so long as any hardship done thereby can be compensated in money".

Mr. White claimed that the plaintiff is entitled to be compensated and that the first defendant should be 'fined' for its mistakes; and that the fine should be the sum total of all the costs of both the amendment and the adjournment and all costs incurred and which will be thrown away in consequence of the adjournment.

Where a party obtains leave to amend at the trial which results in the adjournment of the trial, he will generally be ordered to pay not only the costs of the amendment, but also the costs thrown away by the adjournment (v. Ascherberg, Hopwood & Crew Ltd. v Casa Musicale Sonzogna di Pietro Ostali SNC (1971) 3 All ER 38 C.A.).

Mr. White urged the Court to find, although there is no authority directly in point, that leave to amend very shortly before the date fixed for trial should be equated with an amendment at trial; the Court agrees that when amendment takes place in close proximity in time to the trial, the effect can be much the same and that, generally, the same principles should apply if, as a result, an adjournment is inevitable, as the Viscount conceded was the case here, so that costs incurred are thrown away by the adjournment.

Rule 7/5 of the Royal Court Rules 1982 provides that the Court may postpone or adjourn a trial or hearing of an action "on such terms, if any, as it thinks fit".

Rule 6/12 (1) provides that the Court may allow any party to amend his pleading "on such terms as to costs or otherwise as may be just".

It is difficult to comprehend why the wording of the two rules should be different, except that they follow closely the like rules in the Rules of the Supreme Court. Because the Royal Court Rules do follow closely the Rules of the Supreme Court it has been the practice of this Court to have regard to the Supreme Court Practice (the White Book) and the English cases there cited. The Court acknowledges that they are of strong persuasive authority.

Nevertheless, the Court has, as the parties agreed, a general discretion and a general discretion is general and thus is unfettered, provided that it is exercised judicially and not arbitrarily or capriciously. The Court is not bound by the English Authorities, although it will pay close regard to them. The Court is entitled to consider whether there are exceptional circumstances to lead the Court not to follow the general rule and, having considered the matter very carefully, the Court was of the opinion that there are exceptional circumstances in the instant case.

The first defendant was declared 'en désastre' on the 16th January, 1987. The Court had to consider the role of the Viscount in 'désastre' proceedings. Mr. White argued that the duty of the Viscount in a 'désastre' is merely to collect in and liquidate the assets for the benefit of the creditors who have proved their claims. If the ownership of any asset is disputed the question can only be settled by the Court.

In a letter of the 20th October, 1987, addressed to the Viscount and exhibited to the Court, Mr. White relied on the Court's description of a 'désastre' in re: Désastre Overseas Insurance Brokers Limited (1966) J.J.547 at p552:-

"..... a declaration of bankruptcy, the ~~effer~~ effect of which is to deprive an insolvent debtor of the possession of his moveable estate and to vest that possession in H.M. Viscount whose duty it is to get in and liquidate that estate for the benefit of the creditors who prove their claims."

Mr. White also relied on Viscount v Jersey Services Company (1954) Limited (1966) J.J. 651, at p652:-

"As C.S. Le Gros says in his "Droit Coutumier de Jersey", at p75, "Le désastre est une procéduce qui a pour but d'établir l'égalité entre les créanciers d'un débiteur insolvable dans la distribution de ses biens - mobiliers après paiement des préférences accordées." In effect, the authority given to the Viscount is to make a general arrest on all the assets of the debtor for the benefit of all the creditors and is in no way different from an authority given to him to arrest assets for the benefit of a single creditor.

"If, therefore, the ownership of any asset is disputed, the question can only be settled by this Court and the nature of the action to be taken in this connection will depend on the circumstances of the case".

However, in the Overseas Insurance Brokers Limited case to which we have referred the Court in leading up to the definition cited above said, at p551:-

"We conclude that whereas it may well have been the case that in its original form the 'désastre' was invented to consolidate the claims of numerous creditors and to preserve a status of equality between them, its scope has been enlarged over the years ....." and further referred to "the evolution of the désastre".

The Viscount urged that, as part of the evolution of the 'désastre' he also has an investigative role with responsibilities and duties to protect the public interest and the good name and reputation of this Island.

He put it thus:

"As Jersey's standing as an international finance centre grows and the volume of offshore business expands, it is necessary for the insolvency service to respond in a manner that will ensure the continued protection of the public interest.

"The actual process of 'désastre' administration in Jersey has itself become necessarily investigative, for its overriding objective is to safeguard the Island's reputation for commercial integrity and morality.

".... whenever insolvency does occur, the Insular Authorities will act to examine the reasons underlying the failure, and to recover the assets for the benefit of those who are properly entitled to them".

Like Mr. White, the Viscount also relied on the extract from Viscount v Jersey Services Company (1954) Limited (already cited supra) because "if ... the ownership of any asset is disputed ... the action to be taken ... will depend on the circumstances of the case".

In H.M. Viscount - v - Woodman and Arthurs (1972) J.J.2085, the Court, at p2086, said this:-

"On July 28th 1971, a company called "Le Val Construction Co. Ltd. was declared by one of its creditors to be 'en désastre'. The Act of the Royal Court granting that declaration had for effect to assign all the company's assets to Her Majesty's Viscount, the plaintiff, whose duty it

became to investigate the company's affairs, realise its assets and distribute the proceeds of that realisation among the company's creditors according to law". (Emphasis added).

The Court recognized, therefore, that the system of 'désastre' had further evolved and that the Viscount was under a duty to investigate the debtor's affairs. Whilst the Court must be careful not to usurp the functions of the legislature, and the enactment of a new Bankruptcy Law is clearly a matter for that body, the common law does not stand still but evolves with the times and in accordance with the needs of society.

Also in H.M. Viscount - v Woodman and Arthurs, at p2092, the Court said this:-

"In support of the case of neither party was any legal argument addressed to the Court. Counsel for the plaintiff expressed surprise at the thought that the defendants might not be held liable for what they had done and Counsel for the defendants expressed puzzlement at the thought that they might.

"As is regrettably becoming more frequently the case, it is left to the Court to discover for itself, unaided, the legal grounds for its decision".

It is hardly surprising, therefore, that the Viscount now takes a more active part in litigation of this kind, both to address the Court fully and to carry out his wider duty in a 'désastre' situation, as he sees it. This Court recognizes that the 'désastre' procedure has further evolved and approves the wider role of the Viscount as he described it to us. If for this reason the Viscount appears not to act wholly impartially, because he is concerned that the interests of, as yet, undiscovered creditors, should be protected, he is not to be criticized for it. In this Court's view the position of the Viscount in a

'désastre' is wholly exceptional and, in the exercise of its discretion, the Court is not to feel bound by the principles established by the Supreme Court practice and English cases.

The Court has to go on to consider the conduct of the parties and it is necessary to pay some regard to the facts, without in any way deciding them, because that will be the task of the trial court. The plaintiff is an Isle of Man Company that was always administered in Jersey. It was formed to trade in or offer to sale Krugerrand gold coins to American investors. Later, the sphere of operation expanded to precious metals. The plaintiff was effectively funding the trade. The plaintiff alleged a breach of the funding arrangement and refused to make further monies available. Consequently, the first defendant's line of credit ran out and it was unable to meet its commitments. This action then issued, followed by certain other actions, one of them brought in Jersey by an American investor who obtained judgment. Consequently the 'désastre' was declared. The plaintiff claims monies owed to it by the first defendant, the amount thereof to be determined. The plaintiff also claims that it has a pledge over the coins and metals held by the second defendant, which would give it a preference over all other creditors. The plaintiff is the main creditor of the first defendant; the Viscount advised the Court that an estimate of £663,000 was probably adequate for present purposes. The sum of £162,000 was claimed by American investors for monies paid for coins and metals not delivered up to them.

The assets, apart from a very small amount of money in the bank, comprised only coins and metals in the hands of the second defendant to a value of some £400,000. Thus, if the plaintiff were to be successful in its action, its secured claim would use up the whole of the assets and there would be nothing left for the American investors.

The Viscount demonstrated that there is a relationship between the plaintiff and the first defendant through the third parties. The shares in the

first defendant were held by Anglo Coins (Finance) Limited. The third parties, directly or indirectly, hold 35,000 shares, out of a total of 100,000 issued shares, in Anglo Coins (Finance) Limited. Between the 16th February, 1983, and the 11th May, 1984, Mr. Basil Bayliss, one of the third parties, was a Director of Anglo Coins (Finance) Limited. Between the 24th June, 1983 and the 4th January, 1984, Mr. Bayliss was also a Director of the first defendant and the late Mr. Henry Joseph Agutter, the other third party, was his alternate director. The plaintiff is beneficially owned by Mr. Bayliss and the Estate of Mr. Agutter. Thus, persons who, directly or indirectly, were directors and shareholders of the first defendant are seeking, through the plaintiff, to gain preference over the ordinary creditors and, in particular, the American investors.

Mr. White explained that the first defendant was effectively the property of a Mr. R. Hill. The third parties had been approached by Mr. Hill and asked to provide finance. They agreed to do so on certain given terms, as part of which they would receive a minority interest in the first defendant. The shareholding and directorships were merely part of the financing arrangements. The third parties never took any active part in the management of the first defendant, which was treated as the vehicle of Mr. Hill alone. The third parties knew nothing of what was going on in America. If anybody was a villain in this matter, it was Mr. Hill.

The Viscount acknowledged that the third parties have lost a lot of money; they have also started proceedings against the lawyers who advised them and set up the alleged pledging arrangement; the Viscount had been unable to make any contact at all with Mr. Hill who was without the jurisdiction.

It is not necessary for the Court to express any concluded view as to the facts. It may be that Jersey company law is so defective that a director can escape all responsibility, even where a company of which he is a director

continues to trade and to induce investors to part with money for goods which can never be delivered, merely by pleading ignorance. The Court accepts that the activities of Mr. Hill and an associate of his, a Mr. Varsani, need to be examined very carefully. However, the Court is of the opinion that the relationship between the third parties and their vehicle, the plaintiff, on the one hand, and the first defendant and its holding company on the other, is such as to constitute another exceptional reason why the Court should not feel bound to follow the Supreme Court Practice and English cases on the question of costs in this particular case.

The Court has little doubt that if the plaintiff were prepared to have its claim rank "pari passu" with all other creditors, this matter could be resolved without the hearing of any action. It is the insistence of the plaintiff to rely upon its alleged preference without regard to the morality of the matter that is the principal cause of delay.

The Court also noted the long procedural chronology involved in the plaintiff's action. The action was commenced on the 23rd July, 1984, against the second defendant only. The first defendant was later convened as a third party. By the 30th May, 1985, after the filing of Answers, a Counterclaim and Replies, leave was granted to the now first defendant to amend its Answer, the plaintiff was granted leave to file an amended Reply, and second to tenth third parties were convened and given twenty-one days in which to file an Answer. The Court ordered that costs would be in the cause. On the 10th March, 1986, an Order of the Judicial Greffier consolidated two actions then existing into the present action, (then with eleven defendants) gave leave to the plaintiff to amend its original Order of Justice, and gave leave to the defendants and to the plaintiff to file respective Answers and Reply within specified periods. The Greffier ordered that costs would be in the cause. On the 8th October, 1986, the Judicial Greffier ordered that the twelfth to fifteenth defendants be added, that the consolidated Order of Justice be thus amended and that the further defendants file an Answer within specified periods, with leave to the plaintiff

to file a Reply within a further specified period. The Greffier also ordered that the plaintiff give further and better particulars of its earlier Reply. In both these cases costs were ordered to be in the cause. Thus, at every interlocutory stage in these proceedings to date, either the Court has made no order as to costs or it has ordered that costs shall be in the cause. Whilst this was not in any way conclusive of the present issue, it is a factor that the Court was entitled to take into account.

The main thrust of Mr. White's argument was that the Viscount was responsible, by reason of delay, for the adjournment; the hearing date was obtained on the 3rd April, 1987; from that time onwards all the parties knew that the action was to be heard commencing on the 2nd November; in that knowledge it was incumbent upon the other parties to ensure that the hearing could take place; the plaintiff must have a right to bring the matter on to trial; the Viscount should have dealt with amendments to the pleadings much earlier and should, if necessary, have applied to the Court to vacate the dates already fixed; instead he had left the amendment until just before the hearing was due to take place and had entailed the plaintiff in additional expense - preparation done was now abortive and would have to be duplicated, witnesses had been summoned, and so on.

The Viscount argued that Mr. White was approaching the matter in a narrow legalistic way; the 'désastre' situation required a flexible approach. By letter of the 24th March, 1987, he had attempted to alert Mr. White to the need to amend the pleadings. By letter dated 9th April, 1987, he had reserved the right to make amendments. He was able to commence an examination of documents only after discovery. By letter dated 19th August, 1987, he had again given a clear indication of the need to amend. Mr. White had attempted to proceed as if there was no 'désastre' in existence. The Viscount's accountants had very recently established that there must be some further, previously untraced, investors (creditors); the accountants' reports were dated 26th October and 4th November, 1987, and demonstrated the need for delay; it

had been impossible for him to amend and re-amend the first defendant's pleadings any earlier than he had done.

In the view of the Court, neither party is exempt from criticism. The plaintiff appears to have treated the Viscount, an officer of this Court, in exactly the same way as any other litigant. On the 24th March, 1987, the Viscount requested the other parties to defer from applying for a hearing date before he had had reasonable opportunity to assess the position of the first defendant 'en désastre'. That request fell on deaf ears except to the extent that a longer than usual delay to a hearing date was allowed. The action had been set down for hearing on the 9th March, 1987, upon the plaintiff's application, without so much as a courtesy notice of the intention to do so. On the 3rd April, 1987, the day upon which the hearing date was obtained, Mr. White wrote to the Viscount, saying: "Accordingly, and save for the information that will be disclosed upon discovery, my clients have very little to add in assisting you in identifying what, if any, assets Anglo Coins Limited may have". Despite Mr. White's explanation, the Court regards that statement as evasive and obstructive. In the event, the plaintiff proceeded on the 11th June, 1987, by way of a formal summons returnable on the 29th June, 1987, requesting reciprocal discovery by way of lists of documents and made discovery on the 13th July, 1987. The Court notes that more than three months had elapsed already since the 3rd April, i.e. almost half the period allowed to the hearing date.

On the other hand the Viscount had considered proceeding by means of a summons for a stay of the proceedings, but did not do so. As the hearing date got closer he could have applied by summons to vacate the dates fixed, but did not do so. A bundle of documents was sent to him on the 10th August, 1987. Almost immediately a number of excluded documents was requested and, on the 12th August, 1987, these were sent to him. It was not until the week preceding the 14th October, 1987, that some further documents were requested and these were sent to the Viscount on the 14th October. The Viscount was not justified,

therefore, in saying, as he did say, that discovery was not complete until the 14th October and that it was only after that date that he could complete the amendments to the first defendant's pleadings.

Nevertheless, the delay on the part of the Viscount was not inordinate and in our judgment, having regard to all the circumstances, including the pressure of work and the constraints imposed on officers in the public sector and, in this case, the lack of ready co-operation on the part of the plaintiff, the Viscount was entitled to seek leave to amend and re-amend the pleadings of the first defendant without attracting a 'fine' or an order for compensation.

Indeed, in the view of the Court, the Viscount had demonstrated that he would have been entitled to seek an adjournment even at the trial stage; because it was clear that there are American investors who had not been traced and who might well have no knowledge of the procedings at all; and it is not in the public interest or in the interests of justice that their interest in the matter should go by default. Even if the Viscount had filed amended pleadings earlier, an adjournment would probably have ensued in the light of the reports from his accountants.

Accordingly, for all the reasons that the Court has given, it ordered that costs of both the adjournment and the amendments should be costs in the cause.

Jobas Ltd -v- Anglo Coins Ltd.

10th December, 1987.

Cases referred to in the Judgment.

Burgoine -v- Taylor: (1878) 47 L.J. Ch. 542 p. 543.

Tildesley -v- Harper: (1878) 10 Ch. D. 393.

Associated Leisure Ltd & Ors -v- Associated Newspapers Ltd. (1970) 2 All ER 754.

Ascherberg, Hopwood & Crew Ltd -v- Casa Musicale Sonzogna di Pietro Ostali SNC: (1971) 3 All ER 38 C.A.

in re. Désastre Overseas Insurance Brokers Ltd: (1966) J.J. 547 at p. 552

Viscount -v- Jersey Services Company (1954) Limited: (1966) J.J. 651 at p. 652.

H.M. Viscount -v- Woodman & Arthurs: (1972) JJ 2085 at p. 2086.