ROYAL COURT
(Samedi Division)

16th January, 1995

Before: The Deputy Bailiff, and
Jurats Vibert and Potter

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| Between: | Mayo Associates S.A. | First Plaintiff |
| | Troy Associates Limited | Second Plaintiff |
| | T.T.S. International S.A. | Third Plaintiff |
| And: | Cantrade Private Bank Switzerland (C.I.) Limited | First Defendant |
| And: | Touche Ross & Co. | Second Defendant |

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Advocate P. C. Sinel for the Plaintiffs.
Advocate A. R. Binnington for the First Defendant.
Advocate A. Hoy for the Second Defendant.

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JUDGMENT

THE DEPUTY BAILIFF: This is a summons issued by the second defendant in this action ("Touche Ross") seeking:-

> *"1. That the service of the proceedings upon the second defendant, Touche Ross & Co. (and any order granting leave to serve proceedings on the second defendant out of the jurisdiction) be set aside.*
>
> *2. Further or alternatively that the proceedings be stayed alternatively stayed as against the second defendant, Touche Ross & Co."*

This action was instituted by Order of Justice by Mayo Associates S.A. ("Mayo"), Troy Associates Limited ("Troy"), and T.T.S. International S.A. ("TTSI"), to which we shall refer collectively as "the plaintiffs", and was duly served upon the first defendant ("Cantrade"). Cantrade is a Jersey company carrying on business within the jurisdiction. The Order of Justice alleged breach of contract and negligence on the part of Cantrade in relation to certain foreign exchange transactions conducted by Cantrade with Anagram Bermuda Ltd. ("Anagram") which was acting on

behalf of Mayo and TTSI. Against Touche Ross the plaintiffs alleged negligence in relation to the auditing of the results of certain of these foreign exchange transactions. By order of the Judicial Greffier of 21st September, 1994, the plaintiffs obtained leave to serve Touche Ross out of the jurisdiction. On 25th November, 1994, after hearing argument from Counsel for the plaintiffs and for Touche Ross, the Judicial Greffier stayed the action as between the plaintiffs and Touche Ross pending a hearing by the Court of this summons.

During argument, there emerged some understandable confusion as to whether the relevant Rules at the time of the Judicial Greffier's order on the 21st September, 1994, were the Service of Process (Jersey) Rules, 1961 ("the 1961 Rules") or the Service of Process (Jersey) Rules, 1994 ("the 1994 Rules"). The affidavit of Advocate P. C. Sinel submitted with the application for leave to serve out of the jurisdiction upon Touche Ross referred to the 1994 Rules. At the hearing, Counsel appeared to agree that the 1961 Rules were applicable. The confusion arises because the 1994 Rules which were made on 25th August, 1994 did not, no doubt as the result of an oversight, expressly declare a date for coming into force, nor expressly repeal the 1961 Rules. By an amendment to the 1994 Rules made by the Superior Number on 22nd September, 1994, and expressed to come into force on that day, the 1961 Rules were expressly repealed. What is not clear, therefore, at first blush, is which Rules were actually in force on 21st September, 1994.

The first question is whether the 1994 Rules, in the absence of an express commencement provision, came into force on 25th August, 1994. In England, a statute takes effect without promulgation or other proclamation; a statutory instrument, according to a decision of Bailhache J in Johnson v. Sargeant & Sons (1918) 1 KB 101, does not come into force on the day on which it is made, but on the day on which it is first made available or known to the public or to the person whom it is sought to affect. In Jersey, in default of an express provision, laws and regulations come into force on promulgation, and orders have effect (unless they require for their validity the approval of the States) on the day on which they were passed. That appears to be implicit from the terms of the Official Publications (Jersey) Law, 1960. What is the position with Rules of Court? Article 11(3) of the Royal Court (Jersey) Law, 1948, provides:

> *"(3) Rules of Court made under this Article may be amended or revoked by subsequent Rules and shall be laid before the States as soon as may be after they are made and if the States, within the period of twenty-one days beginning with the day on which any such Rules are laid before them, resolve that they be annulled, they shall cease to have effect, but*

*without prejudice to anything previously done thereunder or to the making of any new Rules."*

The implication is that Rules of Court come into force when made. That is reinforced, in our judgment, by the fact that Rules are made in consultation with a Rules Committee, composed of representatives of the Jersey Bar and the Chambre des Ecrivains, i.e. those most likely to be affected by or concerned with the practical working of the Rules. We therefore find that the 1994 Rules came into force on 25th August, 1994.

The second question is whether the 1961 Rules remained in force after 25th August, 1994 notwithstanding the absence of an express repeal provision. There is no doubt that both sets of Rules cover much the same ground. In some respects, the 1994 Rules are identical to the 1961 Rules, but in other respects they are different. The learned author of Maxwell on the Interpretation of Statutes (12th edition) states at p. 193:

*"If, however, 'the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together' (Kutner v. Phillips [1891] 2 QB 267 per A.L.Smith L.J. at p.272) the earlier is abrogated by the later."*

It would, in our judgment be nonsensical to contemplate the co-existence of the 1994 Rules and the 1961 Rules. We therefore find that the 1961 Rules were impliedly repealed by the 1994 Rules on the coming into force of the latter on 25th August, 1994. The express repeal of the 1961 Rules on 22nd September, 1994 was thus enacted *ex abundanti cautela.*

We have set out our reasoning in case it is germane on another occasion. For present purposes, however, nothing in fact turns upon the slightly different phraseology employed in the two versions of the relevant paragraphs of the Rule. The relevant paragraphs of Rule 7 of the 1994 Rules are as follows:

*"7. Service out of the jurisdiction of a summons may be allowed by the Court whenever -*

*...*

*(c) The claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;*

*...*

*(f) The claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction;".*

It is common ground that, whereas it is arguable whether the alleged tort or torts giving rise to the cause of action were committed within the jurisdiction, there is no question but that Cantrade has been duly served and that Touche Ross is a proper party to the action. Counsel for Touche Ross did not accept that his clients were a "necessary" party, but he conceded that they were a "proper" party. The Judicial Greffier therefore had jurisdiction to make the order of 21st September, 1994. Whether, in the exercise of his discretion, he ought to have made it is of course another matter.

Mr. Hoy for Touche Ross argued that leave should not have been given to serve his clients out of the jurisdiction. Alternatively the *forum conveniens* for the trial of this action was England and not Jersey, and the action should accordingly be stayed. Mr. Hoy, who had most helpfully summarized his arguments in an outline of submissions, drew our attention to the English case of the Spiliada (1986) 3 All ER 843 which was cited with approval by the Jersey Court of Appeal in Wright v. Rockway Limited and Another (30th September, 1994) Jersey Unreported C.of.A., as being the leading authority on the exercise of discretion and in particular the determination of the issue as to *forum conveniens*. We pause here to note that in many respects the principles applicable to the question of whether the Court has properly exercised its jurisdiction to order service out and the question of whether there should be a stay of proceedings on the ground of *forum non conveniens* are not dissimilar.

Lord Goff put it succinctly in the Spiliada at page 858 as follows:

*"It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v. Robinow (1892) 19 R (Ct of Sess) 665 at 668, viz to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Ord. 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Ord. 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has*

*specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted 'unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction' (see RSC Ord. 11, r 4(2).*

*Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case [1983] All ER 884 at 891, [1984] AC 50 at 65 that the jurisdiction exercised under Ord 11 may be 'exorbitant'. This has long been the law. In Société Générale de Paris v. Dreyfus Bros (1885) 29 Ch D 239 at 242-243 Pearson J. said:*

> *' ... it becomes a very serious question ... whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.'*

*That statement was subsequently approved on many occasions, notably by Farwell LJ in The Hagen [1908] P 189 at 201, [1908-10] All ER Rep 21 at 26 and by Lord Simonds in your Lordships' House in Tyne Improvement Comrs v Armement Anversois SAl, The Brabo [1949] 1 All ER 294 at 305, [1949] AC 326 at 250. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."*

It may be noted that Order 11 of the Rules of the Supreme Court is in broadly similar terms to Rule 7 of the 1994 Rules.

We turn, therefore, to the first question raised by this summons which is whether the plaintiffs have shown not only that Jersey is the appropriate forum for the trial of the action, but also that this is clearly so.

Mr. Sinel submitted that Jersey was the appropriate forum for the following reasons:-

1. Inasmuch as the preponderance of witnesses lived anywhere, they lived in Jersey.

2. The bulk of the relevant documentation was in Jersey or on its way to the island.

3. There was a legitimate juridical advantage to the plaintiffs if the action were heard in Jersey. It was argued that damages for an injury to reputation were more readily available in this jurisdiction.

4. The Royal Court was already seized of a related matter, i.e. proceedings brought by the plaintiffs against Dr. Robert Young, Mrs. Young and Anagram. Anagram was owned by Dr. and Mrs. Young. Anagram had conducted certain investment management functions on behalf of Troy in respect of funds belonging to clients of Mayo.

5. The trading which had been conducted by Anagram and which lay at the root of this action took place in Jersey.

We take each of these arguments in turn.

1. It appears from the evidence and from submissions that many, if not most, of the witnesses as to fact who will testify for Cantrade are resident in Jersey. Conversely, all the witnesses for Touche Ross are resident in England. The witnesses for the plaintiff are resident in Switzerland and Bermuda. They are willing to come to Jersey, argued Mr. Sinel; but Mr. Hoy pointed out that they would presumably be equally prepared, if the necessity arose, to travel to England. Expert witnesses are resident in Jersey and England. We do not find the arguments as to the residence of the witnesses to be determinative of the issue. It is true that, on a balance of convenience, the scales probably tip in favour of Jersey. On the other hand, Jersey is not far from England and travel between the two jurisdictions is not difficult.

2. So far as the situation of the relevant documentation is concerned, we again find this to be a peripheral factor. Some of the documentation is in England. Some is in Jersey. Wherever the litigation takes place, copies of the relevant papers will have to be moved from one place to another.

3. Mr. Sinel argued that the juridical advantage to the plaintiffs of proceeding in Jersey was a significant factor. He submitted that there had been considerable damage to Mayo's reputation. Troy had been marketing investment schemes for twenty years and had been ruined as the result of the loss of investors' money which had occurred. His preliminary research indicated that Jersey

law was more generous than English law in assessing damages for non pecuniary loss. It is true that damage for what we might term *'dommage moral'* may well be more widely available here than in England. Whether there has been *'dommage moral'* in this case and, if so, whether damages should be awarded in that respect, is a matter for another day. Mr. Hoy responded that, if Jersey law were to be found to be applicable, it could be applied by an English Court. We doubt whether that argument is correct, because the assessment of damages is generally a matter to be determined in accordance with the *lex fori* rather than in accordance with the law of the place where the tort was committed. Be that as it may, this factor, if it exists, again cannot be decisive. The underlying principle is to determine the forum where justice may best be achieved. In order to achieve that end, the interests of all the parties must be considered. The fact that there may be an advantage to the plaintiffs so far as the assessment of damages is concerned by proceeding in this jurisdiction is certainly a factor; it is not one, however, to which in this case the Court attaches much weight.

4. Mr. Sinel argued that the plaintiffs had committed considerable resources to the related litigation which has already commenced in this Court. In December, 1993, the plaintiffs instituted proceedings by Order of Justice against Dr. and Mrs. Young and Anagram, obtaining Mareva and Anton Piller Orders *ex parte* from the learned Bailiff. In relation to that action, there have already been several days of argument before this Court, and more than one interlocutory judgment. A chartered accountant working in Jersey has been retained by the plaintiffs to carry out investigative work and will be a witness in those proceedings and in this action. It would be unfair, he submitted, to require the plaintiffs to begin again against Cantrade and Touche Ross in another jurisdiction. Mr. Hoy argued in reply that the action against Cantrade and Touche Ross was at an early stage. The work of the plaintiffs' chartered accountant would not be wasted for he could travel to England and give evidence there. Mr. Hoy said that the involvement of English lawyers in this action was inevitable and not unreasonable. Their work would be facilitated if the action were heard in England. We make no finding as to whether the involvement of English lawyers is either necessary or desirable. We do, however, find that there is some force in this argument of Mr. Sinel.

5. Mr. Sinel's final argument was that the trading which lies at the root of this action took place in Jersey.

This appears to us to be the crucial consideration. Before we examine it in more detail, however, we must advert to some other arguments advanced by Mr. Hoy.

Although Mr. Hoy conceded that the Court had jurisdiction to order service out under Rule 7(c), he invited us to consider Rule 7(f) on the discretionary issue, i.e. whether the Court should properly exercise its jurisdiction under Rule 7(c). Rule 7(f) provides that service out may be permitted where the action is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction. Mr. Hoy submitted that the tort, if any, was committed in England. He drew attention to the terms of the allegation against Touche Ross contained in the Order of Justice, viz. that Touche Ross was negligent *"[i]n auditing the results provided as aforesaid and/or in signing and/or certifying the same and/or in preparing and/or making and/or signing the Certificates and each of them"*. It was not alleged, however, that any auditing, signing, certifying, preparing or making by Touche Ross took place in Jersey. Mr. Hoy further drew attention to the allegation in the Order of Justice that the certificates or certified results were sent to Bermuda or to Switzerland rather than to any address in Jersey. In argument, Mr. Sinel asserted that the certificates had been sent to Anagram in Jersey and then distributed to the plaintiffs in Bermuda and Switzerland. That does seem to be implicit from the terms of sub-paragraphs (1) (2) and (3) of paragraph 74 of the Order of Justice. Mr. Hoy also drew attention to paragraph 83 of the Order of Justice which includes allegations of omissions on the part of Touche Ross but does not assert that the omitted steps should have been taken in Jersey. We do not need to decide whether the proper law of the alleged tort is Jersey law or English law. We make two observations, however, on this submission by Counsel for Touche Ross. The first is that it is difficult to see how an audit or certification of the results of the foreign exchange transactions which took place in Jersey could be carried out without attending at the premises either of Anagram or of Cantrade (or both). The purpose of an audit is to carry out a methodical review of financial accounts in order to verify their accuracy. That must surely require the attendance of a representative of the auditing firm for the purpose of inspecting at least some of the raw material. If it be the case, as alleged by the plaintiffs, either that no such attendance took place, or that the inspection was inadequate, it must be strongly arguable that a substantial and efficacious omission was perpetrated within the jurisdiction. Even if the certificates were prepared, signed and transmitted in and from the offices of Touche Ross in England, it must be arguable that the substantial breach of duty took place in Jersey. The second observation is that it may be that nothing much turns upon the issue of whether Jersey or English law governs the alleged tort. This Court has often, in recent decades, adopted, in relation to the tort of negligence, the principles of English law. We need cite only Hacquoil v. George Troy & Sons Limited [1970] JJ

1305 in support of that proposition, but there are many other such precedents in the books.

Mr. Hoy also argued that a serious burden would be placed on this Court if litigation of this complexity were to be heard in Jersey. That may well be true, but, if so, it is a burden which the Court must be prepared to shoulder.

We return now to the final argument advanced by Counsel for the plaintiffs, which was that the foreign exchange transactions which are at the root of this action took place in Jersey. Mr. Hoy submitted that this action had only a limited connection with Jersey. He pointed out that the plaintiffs were all foreign corporations incorporated in Switzerland, Liberia and Panama respectively. Mayo is an investment administrator and Troy is an investment manager. TTSI is a wholly owned subsidiary of Mayo. The principals of the plaintiffs live in Bermuda and Switzerland. The brief history of the matter was that Troy devised investment programmes which were extensively marketed in the Bahamas in 1990 and 1991 and in Bermuda in 1993. The foreign exchange transactions entered into pursuant to the investment programmes were undertaken first by an English company called Anagram Econometrics Limited and later by Anagram which was incorporated in Bermuda. The owners of both companies were Dr. and Mrs. Young. It was, however, to be noted, submitted Mr. Hoy, that Dr. Young was living and working in London between 1988 and 1991. It was only in 1991 that he moved to Jersey and that Anagram began operating from St. Helier. It appeared from the evidence, he continued, that a breach of the 10% erosion limit on the capital value of the funds (which was designed to avoid excessive losses) took place before the business was moved to Jersey. Furthermore, although he conceded that Cantrade was a Jersey company, Mr. Hoy pointed out that it was a subsidiary of a well-known Swiss banking group.

Counsel for Cantrade put his clients' position succinctly. He submitted that there was no forum more clearly appropriate than Jersey. The overriding consideration was, however, that the claims against Cantrade and Touche Ross should be heard in the same jurisdiction. When two defendants were sought to be made liable, it was likely, if the plaintiffs' claim succeeded, that a contribution would be sought as between defendants. There was a risk, if proceedings took place against Cantrade and Touche Ross in different jurisdictions, that conflicting decisions might result. The quantification of losses would arise in both proceedings. As to whether the proceedings took place in Jersey or England the position of Cantrade was, however, essentially neutral.

Our conclusion is that the appropriate jurisdiction in which these claims should be heard is Jersey. It is true that many of the players in this drama have nationalities or places of residence which are, from this perspective, foreign. The fact

however remains that these foreign plaintiffs chose to entrust the investment of their funds to individuals and to a company who were, at the time when the bubble burst, trading in Jersey. More importantly, the foreign exchange transactions which lie at the root of this dispute were conducted in Jersey by a company resident and operating within the jurisdiction. Another significant factor, in our judgment, is that substantial funds have already been expended by the plaintiffs on litigation in Jersey. The expenditure may not be on the scale incurred in the case of the Spiliada, but it is nonetheless important. A team of lawyers and accountants who are now conversant with the esoteric language and practicalities of foreign exchange transactions has been assembled. It is true that the action against Touche Ross lies on the extremity of this canvas. But it is nevertheless part of the same picture. It would undoubtedly involve a replication of effort and expense if the plaintiffs were required to assemble another team in England. Conversely, however, the disadvantage to Touche Ross of defending the action in Jersey is less significant. As indeed pointed out by Mr. Hoy in a different context, the action against Cantrade and Touche Ross has only relatively recently got off the ground. We agree with Mr. Binnington that it would be highly undesirable to make an order which divided the action against Cantrade from that against Touche Ross. The same loss is pleaded against both defendants and separate litigation would indeed give rise to the risk of conflicting judgments.

Mr. Hoy drew our particular attention to the dictum of Pearson J. in Société Générale de Paris v. Dreyfus Bros [1885] 29 Ch.D. 239 at 242-3 cited above, where he said:

> ***"It becomes a very serious question ... whether this Court ought to put a foreigner who owes no allegiance here to the inconvenience and annoyance of being brought to contest his rights in this country ... ".***

Lord Goff in the Spiliada described the jurisdiction exercised under Order 11 as "extraordinary". But these cautionary remarks all go, as indeed pointed out by Lord Goff later in the same speech, to the exercise of discretion. There is a proper distinction to be drawn between a defendant resident in Timbuctoo and a firm of accountants practising in Nottingham. It is not so great an imposition to bring here defendants who speak the same language, who live in a country united with this bailiwick under the British Crown, and who live in reasonable geographical propinquity.

We find that the plaintiffs have discharged the burden of satisfying us that Jersey is clearly the appropriate forum for the trial of the action against Touche Ross, and, that the Judicial Greffier properly exercised his discretion to order service out of the jurisdiction.

It only remains to deal with the second limb of the summons which seeks a stay of the proceedings. During argument, Counsel for Touche Ross narrowed his application to seek a stay only against both defendants. As Lord Goff suggested in his speech in the Spiliada, the principles applicable in *forum non conveniens* cases bear a marked resemblance to those which apply in the Order 11 cases. We are looking in some respects at the obverse of the same coin. The burden is, however, on the defendant to satisfy the Court that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. A stay should not be granted unless the Court is satisfied that the interests of all the parties and the interests of justice could more appropriately be met in some other such forum. It follows inexorably from our conclusion on the first limb of this summons, that we are not so satisfied. The summons is accordingly dismissed.

## Authorities

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