ROYAL COURT
(Samedi Division)

102.

6th June, 1995

Before: The Deputy Bailiff, and
Jurats Blampied and Vibert

Application by the Royal Bank of Scotland plc, and the Royal Bank of Scotland (Jersey) Ltd., (the Creditors) to declare the property of John Adrian Carlston, Carlston Leisure, Ltd., Dowson Finance (C.I.) Ltd., the Sandringham Hotel, Ltd., Seagrove Hotels, Ltd., Le Bal Tabarin, Ltd., and Jersey Motor Company, Ltd., *en désastre*.

Advocate R.J. Michel for the Creditors.
Advocate D.F. Le Quesne for the Debtors.

JUDGMENT

THE DEPUTY BAILIFF: This is an application by the Royal Bank of Scotland plc and the Royal Bank of Scotland (Jersey) Ltd (I shall call them "the Banks") to declare the goods and effects of Mr. John Adrian Carlston and six of his companies "*en désastre*".

Before we were able to consider the merits of the application which is made under the provisions of the Bankruptcy (Désastre) (Jersey) Law, 1990, Advocate Le Quesne, for Mr. Carlston and the companies, made a preliminary application to have the proceedings stopped. His preliminary attack was three-fold. He asked us to consider that:

1. there was already an earlier application before this Court and therefore a duplication of actions;

2. the first application was adjourned on agreed terms which remain in force. The present application is therefore in breach of those agreed terms;

3. the applicant's conduct is unconscionable. Representations were made in correspondence with the defendants which caused the defendants not to avail themselves of legal remedies and this has seriously disadvantaged them.

By way of background, in November, 1993, the Banks gave notice that they intended to apply to the Royal Court for a

declaration of *désastre* against Mr. Carlston and his companies. Dates were set aside for the hearing. Three days were allocated: the 13th, 14th and 15th December. The hearing was to have been contested. The lawyer representing Mr. Carlston and the companies was not, at the time, Advocate Le Quesne.

There was a timely intervention. On Saturday, 11th December, the parties met. They were trying to compromise the proceedings. Irrevocable letters of authority were produced. Letters by Carlston Leisure Ltd, Dowson Finance (CI) Ltd, Le Bal Tabarin Ltd, Seagrove Hotels Ltd, and the Jersey Motor Company Ltd, were provided. The letters were dated the 10th December, (there had been a preliminary discussion at the Bank on that day) but were signed on the 11th December. The letters were all in identical form. They read like this:

"CARLSTON LEISURE LIMITED
17 Seaton Place,
St. Helier,
Jersey,
C.I.

10th December, 1993

D. Rigby, Esq.,
Regional Manager/Director,
The Royal Bank of Scotland plc and
The Royal Bank of Scotland (Jersey) Limited,
71 Bath Street,
St. Helier,
Jersey.

Dear Mr. Rigby,

We confirm on behalf of Carlston Leisure Limited ("the Company") that that Company hereby irrecoverably authorises and instructs The Royal Bank of Scotland plc ("RBS plc") and The Royal Bank of Scotland (Jersey) Limited ("RBS Jersey") to act in relation to the sale or other disposal of all the Company's assets at such price or prices as you may think fit.

We note your undertaking that you will consult with the Company, Mr. John Adrian Carlston and Mrs. M. Carlston in respect of each such sale or disposal, but we note and accept that by consulting no power or veto in respect of such sale or disposal is deemed to have been given.

It is, of course, understood that the RBS plc and RBS Jersey will use its best endeavours to obtain the best price reasonably obtainable.

....
Director Secretary."

In the first application for a declaration of *désastre* ther are named ten companies. In the present application there are no six companies.

In addition to those irrevocable authorities furthe guarantees and supporting promissory notes were executed durin the course of the meeting in favour of the Banks by Le Bal Tabari Ltd, The Jersey Motor Company Limited and Greve d'Azette Garage Limited.

There was in fact further security documentation but this no longer concerns the Court.

Unfortunately, no record of the meeting was shown to us (there was probably no detailed record made) but the three-day hearing did not proceed because of the matters which we have set out.

Mr. Le Quesne argued that it was unlikely that the case would have been withdrawn. There is no record in the Greffe of it having been withdrawn (and he has researched the matter). Mr. Le Quesne says that it would have been prudent to allow it to continue to hang like a sword of Damocles to keep the parties alert to their obligations.

What was the 1993 application? Mr. Le Quesne says that it was an "action". Rule 6/24 of the Royal Court Rules 1992, as amended, says this:

> ***"Except with the consent of the other parties to the action, a party may not discontinue an action or counterclaim, or withdraw any particular claim made by him therein, or withdraw his defence or any part of it, without the leave of the court, and any such leave may be given on such terms as to costs, the bringing of any subsequent action, or otherwise, as the justice of the case may require."***

And if these are actions, then, of course, he can apply under Rule 6/13 of the Royal Court Rules to have this present second application struck out on the grounds that it is a duplication of the first action and therefore, clearly, an abuse of process.

He relied strongly on a passage in the White Book, under Rule 18/19, and we went through various parts of Rule 18/19, all of which have been used in this Court before. And the passage to which he referred says this at p.347:

"The plaintiff is not entitled to litigate in a second action an issue, e.g. whether a transaction was a moneylending transaction under s.6 of the Moneylenders Act, 1927, which it was open to him to have had determined in the first action, even though the first action had been dismissed by consent and even though the plaintiff's counsel had wrongly made a concession in open Court, including the Court of Appeal, that he could not maintain that issue, since an issue is treated as settled and founds an issue estopped in subsequent proceedings, not only if it is embodied in the terms of the judgment in the earlier action or implied therein following a decision delivered in Court, but also where it is embodied in an admission or concession made in the face of the Court or implied in a consent order".

He says that the facts set out there are analogous to two separate Orders of Justice being brought before the Court. And that position, as he said to us so well this morning, would be quite untenable. But is a *désastre* application an "action" in the sense expressed in the Rules?

In Heerema v. Heerema (1985-86) JLR 293 at 298 the Court said:

"However, the most helpful modern definition of "proceedings" and the difference between "proceedings" and "action" is given by Lord Simon in Herbert Berry Associates Ltd. v. Inland Rev. Commrs. ([1978] 1 All ER at 170): "The primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of a court by writ; 'proceeding' the invocation of the jurisdiction of a court by process other than writ". The two terms, therefore, express different methods of invoking the jurisdiction of the court".

In that regard, although it was not particularly helpful, we looked at the English case of Berry (Herbert) Associates Ltd v. Inland Revenue Commissioners (1977) 1 All ER 161 at 17.

We can see that an action is something that is commenced by a summons.

An application under the Bankruptcy *(Désastre)* (Jersey) Law 1990, is made *ex parte*. There is sometimes but not always an opportunity in such a case for the debtor to be heard. It sometimes happens that the creditor or the Viscount notifies the debtor of the application. Technically that becomes a hearing *inter partes* because both parties are present. The application may be granted or refused but it is not, in our view, an action in the sense of the Royal Court Rules, for example, under Rule 6/24, Withdrawal and Discontinuance: *"Except with the consent of the*

other parties to the action a party may not discontinue an action or counterclaim....".

The question of costs is, in our view, largely immaterial because costs are at large, although it is very interesting that in the Civil Proceedings (Jersey) Law, 1956, under Article 2 of that law it says that ***"the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court and the Court shall have full power to determine by whom and to what extent the costs are to be paid".***

It is impossible for us to view the proceedings (for that is what they are) as an "action" in the sense argued by Mr. Le Quesne. The parties did not come before the Court. It is also impossible for the Court to adjudicate on a bankruptcy declaration based on the facts that appertained in 1993. We cannot repeat too often that the facts are now quite different to what they were then.

Article 3(3) of Bankruptcy (Désastre) (Jersey) Law 1990, says that the bankruptcy declaration shall be made in the form prescribed in Rule 2(3). It would be impossible to proceed on that basis now. We are not deciding an issue and in our view to attempt to revive the 1993 proceedings would be hopeless. They are, in our view, moribund.

We are of the opinion that what in fact happened was that the Banks decided not to proceed with their application. Transactions were in place for what, it was anticipated, would be an orderly sale or realisation of the assets.

By the time it was realised that matters were not proceeding on the course that the Banks anticipated, they made a further application and that could only be made against the reduced number of companies and on the quite different facts that now appertain and it is that application that is before the Court today. In any event by June, 1994, the debtors at that time might well have been able to argue that following the sale of certain properties they had become solvent. They became insolvent when demand was made on the security documentation which was signed voluntarily in 1993.

Mr. Le Quesne says that even until quite recently (and he is referring to a line of correspondence that begins in mid-May of this year) he felt that nothing untoward would happen. He referred to the "1993 agreement" but we cannot see that there was any enforceable agreement in 1993.

In his second affidavit dated 5th May, 1995, Mr. David Rigby, the Regional Manager of the Royal Bank of Scotland plc and a Director of the Royal Bank of Scotland (Jersey) Limited says, at paragraph 12:

"That on the basis of the completed transactions set out above, the Banks agreed not to pursue the applications for désastre, notwithstanding the clear insolvency (as defined in the Bankruptcy (Désastre) (Jersey) Law 1990, of Mr. Carlston and the individual corporate entities forming the Carlston Group of Companies provided further that there then followed an orderly sale or realisation of the assets underlying those various corporate entities sufficient to settle the outstanding liabilities to the Banks."

Whether the word "agreed" is sufficient in the context to create an intention to create such legal relations that Mr. Le Quesne could have brought an interim injunction so as to prevent the Banks from proceeding any further is, in our view, extremely doubtful.

Mr. Le Quesne says that five properties have been disposed of since Carlston *père* died. He told us that a deal had been struck and that the Bank had clearly intimated that they would not pursue. His clients had placed valuable assets with the Bank. There have apparently been no further disposals for more than six months and we need to examine in the context of the complaint, and in order to reach more clearly a decision, the correspondence that took place between the 10th May, 1995, and the 2nd June, 1995, (which was of course last Friday).

On 10th May Mr. Le Quesne wrote to ask in terms, if the Banks would be interested in receiving a proposal which would clearly be some form of acceptable compromise. The letter hints at *"very substantial claims"* that could be made against the Banks. There are serious allegations of assets being sold at unreasonably low prices and misappropriation of funds.

The *désastre* application in the form now before us must have been filed almost contemporaneously with that letter. Mr. Le Quesne was surprised. He said so in as many words. *"I had not expected you to move so quickly from the letters of demand to the applications for désastre".*

His final sentence possibly expresses the situation very well *"I appreciate that your clients may be exasperated".*

The reply from the Banks is ominously frank. *"In default of any firm and purposeful proposals from your clients the application for a désastre will be made on the 5th June".* There is then a detailed proposal by the Banks made in a letter of 23rd May which is rejected on the 24th May. That letter ends with these words:

"Once you have read that (i.e. Mr. Rigby's new) Affidavit, I respectfully suggest that your clients then instruct you on a revised offer. Indeed I look forward to receiving

such a revised offer as soon as possible, and certainly in good time to enable RBS to respond before the hearing on Monday week."

That is what can possibly be described as an invitation to treat. There is nothing more from Mr. Le Quesne other than a complaint about time constraints but an "offer" was put forward by the Banks in a facsimile transmission letter of the 1st June. Mr. Le Quesne felt unable to respond in the time allotted. The proposal fell away.

We can see nothing that leads us to give even a modicum of support to Mr. Le Quesne's argument on these grounds. We sympathise. He is new to the case attempting to grapple with the most complex problems. He is met with Banks and with a lawyer who is both fully briefed and fully conversant with all that has transpired in the past.

We must say this, we are disturbed by some of the facts set out by Mr. Michel. We refer particularly to the fact that the Banks, although appointed directors of Jersey Motor Company, were removed by an Extraordinary General Meeting held on the 20th February, 1995, and that the sale of Seagrove Hotel has apparently been frustrated because a substantial payment to Mrs. Carlston has been demanded for what is described as a valueless area of land forming part of the car park. There are matters of some importance to be discussed. Essentially we wish to know if the application is well-founded. Indeed the transfer by deed of gift of the reversionary interest in "Chestnut Farm" apparently by Mr. Carlston if proved - and we know nothing of the facts of the matter - and if he were unable to meet his guarantee, could have very serious implications.

Mr. Le Quesne has argued his case most eloquently and with great courtesy but we cannot see that he has been disadvantaged. He has argued in any event that the Banks, as he put it, were in breach of the 1993 agreement by bringing this application. As we have said we do not believe that there was a legally enforceable agreement in 1993. If the Banks had "ambushed" Mr. Le Quesne we might have allowed a delay at this stage. To give him some comfort we will say this: we are still able to grant a stay in our judicial discretion under the law. We may be prepared to do that but we will only do it on the substantive hearing. Therefore we dismiss this preliminary point.

[Following the dismissal by the Court of the debtors' preliminary objections, the Court ratified the following consent Order made between the Banks and the debtors:-

"In consideration of:-

1) *Mr. John Adrian Carlston ("Adrian Carlston") and Mrs. Muriel Carlston ("Muriel Carlston") procuring, within seven days of the date hereof, the transfer absolutely of the whole of the issued share capital of Le Bal Tabarin Limited, Jersey Motor Company Limited and Seagrove Hotels Limited to nominees of The Royal Bank of Scotland plc ("RBS plc") and The Royal Bank of Scotland (Jersey) Limited ("RBS Jersey"); and*

2) *the delivery up, within the same seven day period, to nominees of RBS plc and RBS Jersey (together called "the Banks") executed Letters of Resignation by all of the Directors and the Secretary of each of the abovenamed companies; and*

3) *the delivery up, within the same delay, to the Banks' nominees of all the statutory and financial records (including fire insurance records) of the abovenamed companies; and*

4) *Muriel Carlston transferring to the Banks' nominee all the land owned by her situate to the rear of the Seagrove Hotel within twenty-eight days of the date hereof or seven days after Housing Committee consent to the transfer issuing, whichever is the later; and*

5) *the payment, within seven days of the date hereof, of the sum of £70,000 (Seventy Thousand Pounds sterling) in cash to the Banks;*

6) *Adrian Carlston indemnifying the Banks against any trade or other liabilities or indebtedness, whether existing or contingent, to any person, firm or corporate entity, due by any of the corporate entities whose issued share capital is being transferred, other than to the Banks or each other;*

7) *Adrian Carlston taking no steps, prior to the implementation and completion of all steps necessary to give effect to this Consent Order, in relation to the companies whose issued share capital is being transferred, to charge, alter, vary, assign, transfer or otherwise deal in any of those companies' underlying assets.*

The Banks' hereby:-

1. *release and discharge and/or will procure the release and discharge of Adrian Carlston and Muriel Carlston and those corporate entities whose issued share capital is not being transferred to the Banks, from all their indebtedness or liability whether existing or contingent*

to the Banks and/or the corporate entities whose issued share capital is being transferred to the Banks;

2. *withdraw all applications for declarations of désastre forthwith;*

3. *confirm that on the Banks obtaining title to the whole of the issued share capital of Le Bal Tabarin Limited, Seagrove Hotels Limited and Jersey Motor Company Limited, they will procure that each company will declare that it has no claims whatsoever against Adrian Carlston and/or Muriel Carlston;*

4. *confirm that they will, on obtaining title to the whole of the issued share capital of Jersey Motor Company Limited, procure the release by Le Riches Stores Limited of any indebtedness due by Carlston Leisure Limited to it; failing which the Banks will indemnify Carlston Leisure Limited against such indebtedness.*

It is further agreed that there will be no Order as to costs."]

Authorities

Bankruptcy (Désastre) (Jersey) Law, 1990: Articles 1-7.

Application of Rosedale Investments re Barra Hotel Ltd & Ors. (30th May, 1995) Jersey Unreported.

Application of Sparbanken Sverige re Baltic Partners.

Heerema -v- Heerema (1985-86) JLR 293.

Berry (Herbert) Associates Ltd -v- Inland Revenue Commissioners (1977) 1 All ER 161.

Royal Court Rules 1992, as amended: Rules 6/13 & 6/24.

R.S.C. (1995 Ed'n): O.18, r. 7, 9, 33, 36, 38.