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COURT OF APPEAL 182.

26th September, 1997.

Before: The Rt. Hon. The Lord Carlisle, Q.C., (President)
Miss E. Gloster, Q.C., and
The Hon. M.J. Beloff, Q.C.

Between	Mayo Associates S.A. Troy Associates Limited T.T.S. International S.A.	Plaintiffs
And	Cantrade Private Bank Switzerland (C.I.) Limited;	First Defendant
	Touche Ross & Co.	Second Defendant
And	Robert John Young (joined at the instance of the First Defendant)	
	Anagram (Bermuda) Limited (joined at the instance of the First Defendant)	
	Myles Tweedale Stott (joined at the instance of the First Defendant)	
	Michael Gordon Marsh (joined at the instance of the First Defendant)	
	Monica Gabrielli (joined at the instance of the First Defendant)	
	Touche Ross & Co. (joined at the instance of the First Defendant)	
	Cantrade Private Bank Switzerland (C.I.) Limited (joined at the instance of the Second Defendant)	Third Parties

IN THE MATTER OF the Representation of the First Defendants dated 7th March, 1997.

Application for leave to appeal and appeal by the Plaintiffs against the Order of the Royal Court of 3rd July, 1997, that the Plaintiffs' summons - seeking an Order that the Royal Court is without jurisdiction to grant the relief sought in the said Representation and/or that the said Representation be dismissed on the grounds that there are no grounds on which the Royal Court is able to or should grant such relief - be heard simultaneously with the said Representation.

Advocate P.C. Sinel for the Plaintiffs/Appellants.
Advocate A.R. Binnington for the First Defendant/Respondent.

JUDGMENT

GLOSTER, JA: This is an application by the plaintiffs for leave to appeal against an interlocutory order made by the Bailiff, sitting in chambers on 3rd July, 1997. The order directed that a summons issued by the plaintiffs on 23rd May, 1997, and which seeks an order that the Court has no jurisdiction to grant the relief claimed in the first defendant's representation dated 7th March, 1997, and that such representation be dismissed, should not be heard as a preliminary issue but as one of the issues to be determined at the hearing of the representation.

On 3rd July the Bailiff also gave directions for the filing of further affidavits and the filing of skeleton arguments prior to the hearing of the representation.

It is necessary to set out something of the background to this case which has spawned litigation both civil and criminal. I do so from the pleadings and skeleton arguments but of course the various allegations of misconduct have yet to be proved.

The plaintiffs, who at material times, traded as the Troy Trust Service, and for this purpose I make no distinction between the individual plaintiffs, are the investment managers, administrators and, at least to some extent, trustees of certain investment programmes called the TTS and TTSF programmes. The precise extent to which the plaintiffs, or one or more of them, acted as trustees or otherwise owed fiduciary obligations and duties to investors and, if so, whether under Swiss or Jersey Law, may well be issues in the proceedings.

The amended Order of Justice alleges that the plaintiffs arranged for the investment of funds subject to the programmes in foreign exchange dealings, through facilities to be provided by the first defendant, Cantrade Private Bank Switzerland (CI) Limited, which I shall refer to as "the bank", an indirect subsidiary of the Union Bank of Switzerland Group of Zurich.

It is alleged by the plaintiffs that a Dr. and Mrs. Young and their companies were appointed as agents on behalf of the plaintiffs to manage the foreign exchange dealings and to give instructions to the bank in relation to such dealings. Although purported overall profits were reported to the plaintiffs in respect of such dealings, and the plaintiffs, in turn, reported such profits to investors, in fact consistent and substantial losses were incurred in respect of the foreign exchange dealings and consequently substantial sums were lost by investors.

The plaintiffs allege that the bank is liable for the losses incurred on the basis, *inter alia*, of constructive trust, equitable fraud, negligence and breach of contract.

The plaintiffs have also sued the accountants, Touche Ross, on the grounds that that firm allegedly audited and certified the purported results of the foreign exchange dealings conducted by Dr. Young's companies on behalf of the plaintiffs, but the present application is

not in any way concerned with that part of the action as against Touche Ross.

The plaintiffs' amended Order of Justice claims damages and/or compensation not only in respect of investors' losses amounting to some $27m. but also in respect of the plaintiffs' own alleged losses of past and future profits for commission and other matters amounting to some $18m.

Cantrade denies liability to the plaintiffs and contends that responsibility lies with Dr. Young and/or the plaintiffs and/or individuals who were officers of the plaintiffs and/or Touche Ross. The plaintiffs' action is not in the form of an action by the plaintiffs, as trustees, to recover trust monies on behalf of beneficiaries. Rather the case is put on the basis that the plaintiffs acquired title to the funds deposited by investors. The plaintiffs' advocates do not act for the investors or so the bank contends. Criminal prosecutions have recently been instituted in Jersey against Dr. Young, the bank and others and the Court understands that the criminal trial is due to be heard sometime in 1998. It is common ground that the civil trial cannot be heard until after that date.

The bank which, as I have said, denies liability for the losses which investors have suffered, has decided to make an *ex gratia* offer to investors to compensate them for their losses plus interest. The bank is not prepared to offer compensation to the plaintiffs for their own alleged loss of profits. These offers have been made by the bank directly in the case of those investors whose names and addresses it knows, but save through the medium of press advertisement, the bank has not been able to communicate with the other investors whose names and addresses it does not know.

The subsequent procedural history of this matter is as follows:

By a representation issued on 7th March, 1997, the bank sought the appointment by the Court of the Viscount for the purpose of communicating or otherwise dealing with the bank's open offers. In the alternative, the bank sought the appointment of the Viscount as administrator of the interests of the investors in Jersey consisting of their interest in the fruits of the action alternatively for the purpose of protecting their interests in Jersey in respect of the action.

The first time that the representation came before the Royal Court was on 14th March when further consideration of the matter was adjourned until 4th April and service of the representation was ordered on the plaintiffs and they were summoned to appear before the Court on that date. The representation was immediately opposed by the issue by the plaintiffs on 1st April, 1997, of a summons seeking to strike out the bank's representation on the grounds that it disclosed no reasonable cause of action, was scandalous, frivolous, or vexatious might prejudice, embarrass or delay the fair trial of the action or was otherwise an abuse of the process of the Court. That summons was due to be heard before the Judicial Greffier on 29th April, 1997. On 4th April at the adjourned hearing of the bank's representation the Royal Court ruled that the bank's representation was not a separate action but an application within the plaintiffs' main action, gave directions for the filing of evidence in the representation, ordered that the deponent of

any affidavit should be available for cross-examination at the request of the other party, and ordered that the application before the Judicial Greffier to strike out the representation should itself be struck out and in the course of that hearing it appears that the Bailiff said:

> *"In the context of this case the Judicial Greffier has no jurisdiction to hear a summons to strike out a representation which is before the Court and which has not been delegated by the Court to him".*

The Bailiff went on to say that, accordingly, on that basis, the Court was striking out the plaintiffs' summons to strike out. The Court refused the plaintiffs' leave to appeal and the plaintiffs have not sought leave to appeal from that decision to this Court.

On 23rd May, 1997, the plaintiffs issued a further summons which is the subject matter of this present application and which, as I have already said, sought an order that the Royal Court does not have jurisdiction to grant relief sought in the first defendant's representation and that accordingly the representation should be dismissed.

It is to be observed that the summons does not seek in terms the striking out of the representation but rather a declaration, in effect, that the Court has no jurisdiction to make the relief sought.

As I have already said, the case came on for hearing before the Bailiff in chambers on 3rd July when, after hearing argument, he directed that the summons should not be heard as a preliminary issue but rather as one of the issues to be determined in the bank's representation.

We have been told that a date has now been fixed in early December for the hearing of the representation and the plaintiffs' summons with an estimated three days for the hearing, the estimate having been provided by the bank's advocate and not opposed by the plaintiffs' advocate. The plaintiffs seek leave to appeal that decision of the Bailiff and seek an order that the dates for the hearing of the bank's representation be set aside and that the plaintiffs' summons alone be heard on the date originally fixed for the hearing of the bank's representation and consequentially the Bailiff's order for service of evidence in relation to the representation be suspended.

In his admirably concise argument on behalf of the plaintiffs, Advocate Sinel submitted that the Bailiff's decision was plainly wrong and that accordingly this Court should intervene to order that the plaintiffs' summons should be heard in effect as a preliminary issue, prior to the full hearing of the bank's representation. In support of this submission Advocate Sinel, in summary, submitted as follows: First, that the Bailiff at no time directed his mind to the conflicting merits of the two applications and in particular to the fact that the bank's representation is doomed, as Advocate Sinel contends, to failure.

Second, he submits that the Bailiff failed to take account of the fact that the plaintiffs' summons as to the jurisdiction of the Royal Court can be dealt with in a speedy and summary way in about half a day, as he contends, without the need to refer to any of the voluminous

evidence filed in the representation and without the need for cross-examination of the deponents. In addition, Advocate Sinel submits that that course would obviate the need to burden the plaintiffs with the heavy costs of a lengthy hearing which could amount to some five to ten days if the representation proceeds.

Third, Advocate Sinel submits that the Bailiff had failed to take account of the fact that the plaintiffs had, upon two occasions, taken proper steps to challenge the validity of the bank's representation and that the Court had declined to entertain the application.

In my judgment this is not an appropriate case in which to grant leave to appeal and my reasons can be summarised as follows:

First, the decision whether the plaintiffs' summons seeking in effect a declaration that the Royal Court has no jurisdiction to grant the relief sought in the bank's representation should be heard at the same time as the representation, or as a preliminary issue prior to the hearing of the bank's representation, was a procedural decision as to a case management matter. There is well established authority for the proposition that such a matter rests fairly and squarely within the discretion of the judge in control of the proceedings, with whom an appellate court should not lightly interfere and whose decision the appellate court should respect unless plainly wrong; see, for example, Ashmore -v- Corporation of Lloyds [1992] 2 All ER 486 HL, per Lord Templeman at p.493; Purdie -v- Bailhache & Bailhache [1989] JLR 111 at p.117.

Second, on the material before him, the Bailiff in my judgment was clearly entitled to come to the conclusion that it was more sensible to treat the jurisdictional point raised in the plaintiffs' summons as merely one argument that had to be considered in the context of the bank's representation as a whole and not as a separate issue. He was entitled to form the view, particularly in the light of the position adopted by the bank's advocate, that it might well be necessary for the Court to consider the evidence and the facts upon which the representation was based in order to determine the jurisdiction issue - in other words that it was necessary to look at the detail of the factual material to ascertain not only whether as a matter of discretion an order should be made but whether the Court had power to do so.

Third, likewise, in my judgment, the Bailiff was perfectly entitled to form the view that the determination of the representation, including the plaintiffs' jurisdictional point, would not require and indeed should not require, lengthy cross-examination of deponents, or the resolution of wholly disputed factual matters that should more properly be left to trial.

This has been confirmed in this Court by the submissions made by Advocate Binnington for the bank who has stated that the bank's position is that it is unnecessary for there to be cross-examination on the affidavits or a resolution of contested allegations of fact for the purpose of the representation. The bank has stated in submission that it does not intend to cross-examine the plaintiffs' deponents at the hearing of the representation. Any concern therefore that the hearing of the representation might turn into a mini-trial of issues that will

arise in the main action can properly be dealt with by the Bailiff in his management of the hearing of the representation.

Fourth, I see no reason for criticism of the Bailiff for not considering the merits or demerits of the representation in the context of this application. That would, in effect, have involved a hearing of the plaintiffs' summons.

Fifth, I see no basis for any criticism of the Bailiff in respect of the third complaint raised by Advocate Sinel. The earlier strike-out summons had been dismissed on procedural grounds and had not been further pursued by the plaintiffs. As to the second summons, the Royal Court has not declined to entertain that application and the summons has not lost its effect by not being heard as a preliminary issue. The jurisdictional point remains a point to be considered at the hearing of the representation. In all the circumstances I see no reason whatsoever for interfering in a decision that, as a case management matter, was clearly within the Bailiff's discretion. Accordingly, I would dismiss this application for leave to appeal.

CARLISLE, JA: For the reasons that have been given, I agree and have nothing to add.

BELOFF, JA: I also agree for the same reason.

Authorities.

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4 Halsbury 37: p.435.

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