

Judgment 55/2003

**Seed International Limited v
Tracey et al
Court of Appeal
(Civil Appeal 341)
18th December, 2003**

Law Reform (Miscellaneous Reform Provision) (Guernsey) Law, 1987 – Mareva injunction freezing bank accounts in Guernsey – substantive proceedings commenced in the Netherlands – allegations of fraud – appeal from order by Royal Court for disclosure of information by the bank – jurisdiction of the Royal Court to make a disclosure order, ancillary to a freezing order, is not limited to support of proprietary claims – disclosure order may be made with an ambit wider than that of the associated freezing order.

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 18th day of December, 2003 before Richard Charles Southwell, Esq., QC Presiding, Peter David Smith Esq., QC and Patrick Stewart Hodge Esq., QC

SEED INTERNATIONAL LIMITED

Appellant

and

(1) DR RONALD TRACEY

(2) DR DONALD F. SELLER

(3) SANDRA K. SELLER

(4) DR GARY LEWIS KAPLOWITZ

(5) DR ELISEA SINGSON

(6) DR JOHN A. CARPENTER

(7) DR KURT A. WEISENFELS

(8) DR ARTHUR S. LEON

(9) DR LOUIS SOMMERHALTER

(10) DR DAVID W. HOPEWELL

(11) DR EDWIN J. FRINK

(12) DR KIM C. HENDRICK

(13) DR ROBERT B. DAVIDSON

Respondents

In the appeal by the Appellant from the judgment of the Royal Court given on 3rd November, 2003;

THE COURT, having heard Advocates Miss A. M. Ozanne and A. D. Laws for the Appellant and the Respondents respectively thereon, GAVE JUDGMENT as follows, having RESERVED its reasons; and;

1. DISMISSED the appeal, subject to the proviso that the Disclosure Order made by the Royal Court on 3rd November, 2003 be varied to provide in express terms:-
 - (i) That the documents or information obtained pursuant to the said Disclosure Order were only to be used for the purpose of legal proceedings between the parties, unless the Royal Court otherwise directed; and
 - (ii) That in the event that the said documents or information enabled the Respondents to commence new proceedings in a foreign jurisdiction, the Respondents must first seek leave from the Royal Court to commence such proceedings, such application to be on notice unless the Royal Court otherwise directed.
2. ORDERED the Royal Bank of Scotland International Limited (Seventh Respondent in the proceedings before the Royal Court) to produce the information and documents specified in the said Disclosure Order by 12 noon on Monday 29th December, 2003; and that any application to extend that date would have to be made to the Royal Court and no extension should be made other than in exceptional circumstances; and
3. AWARDED costs to the Respondents on the standard recoverable basis in respect of the proceedings in this Court, and in the Royal Court from 6th December, 2002.

K. H. TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

BETWEEN

TRACEY ET AL

APPELLANT

V

SEED INTERNATIONAL LIMITED

RESPONDENT

JUDGMENT – SOUTHWELL JA

1. This is the judgment of the Court on an appeal from a judgment of Deputy Bailiff Rowland which is conspicuous for its thoroughness and good sense, and we wish therefore to begin by paying a tribute to the excellence of his judgment. We have to consider on this appeal whether his decision was one at which he should not have arrived, as contended by Advocate Alison Ozanne on behalf of the defendant appellant, Seed International Limited (“Seed”), formerly called Churchill Associates Limited and incorporated in the Cayman Islands.

2. The facts are fully set out in the Deputy Bailiff’s judgment, and it is therefore unnecessary for this Court to set them out again at length. We will do no more than summarise the main features.

3. For convenience we will refer to the respondents in the action brought by Dr. Donald Tracey and other plaintiffs as “defendants”.

4. The first defendant Seed is the only one appealing from the Deputy Bailiff’s judgment. Seed (which appears to be controlled by Mr. Paul Freeman) has promoted among potential and actual investors from those in the doctor and dentist professions in the United States of America investments in wine (both current and future) and in the loan notes and shares of other companies connected with Seed.

5. The second defendant, Ocean International Marketing B.V. (“Ocean”), formerly called Heros Global Marketing Services B.V., is incorporated in the Netherlands and has acted as Seed’s agent in communications with potential and actual investors in the U.S.A. The third and fourth defendants Mr. Garrett and Mr. Stockdale, were directors of Ocean and closely associated with Mr. Freeman and Seed.

6. The fifth defendant is Disney Limited (“Disney”), which is incorporated in and carrying on business in Guernsey, and licensed by the Guernsey Financial Services Commission to do fiduciary business in Guernsey. It is a subsidiary of Kensington Corporation Limited (“Kensington”). It has been a corporate director of Seed and has executed documents on Seed’s behalf.

7. The sixth defendant, Kensington,
 - (i) is incorporated in Alderney;
 - (ii) carried on, and is licensed by the Guernsey Financial Services Commission to carry on, fiduciary business in Guernsey; and
 - (iii) has provided company administration services to Seed.

8. The seventh defendant, Royal Bank of Scotland International Limited (“RBS International”) and the eighth defendant, Royal Bank of Scotland (Guernsey) Limited (“RBS Guernsey”) carry on (as they are licensed to carry on) banking business in Guernsey. They are believed to be bankers for the other defendants, especially Seed.

9. The thirteen Plaintiffs are practising or retired doctors or dentists living and working in the U.S.A. (or in one instance the wife of a dentist). Each of them was persuaded by Ocean to invest in wine or other enterprises of Seed. They are only a small proportion of approximately 2,000 American doctors and dentists who apparently were persuaded to invest with Seed.

10. As long ago as 22 November 2002 the thirteen Plaintiffs applied to the Bailiff in the Royal Court, ex parte, for a freezing and disclosure order in respect of assets of Seed, Ocean, Mr Garrett and Mr Stockdale within Guernsey up to a value of US\$6,125,035. The application was supported by affidavits of the Plaintiffs setting out the sums which Ocean had persuaded them to invest
 - (i) in wine with Seed; or
 - (ii) in subordinated convertible term loan notes of Optidisc International Ltd. (a Cayman company associated with Seed and formerly called C D Fender); or
 - (iii) in unsecured subordinated loan notes of Cupidus.Com (Turks & Caicos) Ltd (a Turks & Caicos company) redeemable with shares of Cupidus.Com Ltd (a Cayman company), both these companies being associated with Seed; or
 - (iv) B ordinary non-voting shares of 1 penny each in the capital of The Wine Corporation Ltd, a United Kingdom private limited company associated with Seed.

It will be necessary to return later in this judgment to consider in more detail Seed’s and Ocean’s methods of doing business and the investments referred to.

11. In the Plaintiff’s affidavits, in addition to setting out the sums which they have been persuaded to invest with Seed or its associated companies, they dealt with the methods adopted by Ocean to persuade them to invest, and the sums which, according to Ocean, were said to represent the total of their current investment.

12. The application was also supported by an affidavit of Advocate Mark Helyar to which he exhibited two statements of the Plaintiffs' advocate in The Netherlands, Mr H.G.D. Hoek of Kernkamp Advocates, Rotterdam, which Mr. Hoek subsequently swore on oath in the Netherlands. In his statements Mr Hoek described succinctly the "large scale fraud" which he alleged to have been perpetrated on the Plaintiffs by Seed, Ocean and the individuals involved in those companies. He stated that several pre-trial conservatory arrests and third party arrests had already been made in the Netherlands on assets held by Ocean and two of its directors, Mr Garrett and Mr Stockdale. No assets of Seed had been located in the Netherlands. About US\$450,000 had been frozen on Ocean's bank account and Mr Garrett's house. There was no sign, Mr Hoek stated, of "possibly hundreds of millions of U.S. dollars [which] have been transferred from Seed's clients to Ocean's banking account in Rotterdam in the past six years, all that remains now is the US\$450,000." Mr Hoek had discovered that Seed had received in a Guernsey bank account with Royal Bank of Scotland from Ocean large amounts of money. Mr Hoek stated that the Plaintiffs would be making in the Netherlands claims based on

- (i) unlawful conduct in breach of contract and in violation of Dutch law by trading and mediating in transactions regarding futures, securities and similar products without the licences required by Dutch law; and
- (ii) annulment of bilateral judicial acts, based on the breaches of Dutch securities laws, and the fraud perpetrated by Ocean and Seed.

13. Mr Hoek also referred to the circumstances of another client of his, Mr Steven van der Waal, who had invested via Ocean with Seed and who through Mr Hoek had obtained a pre-trial conservatory arrest on Ocean's bank account in The Netherlands; but the arrest had been lifted because Ocean and Seed had provided Mr van der Waal with a bank guarantee.

14. The Bailiff granted the ex parte order. The full text of his order is annexed to this judgment as Annex 1. We therefore summarise only the main features of the order, as follows:

- (i) a freezing order was made in respect of the assets of Seed, Ocean, Mr Garrett and Mr Stockdale within Guernsey up to a value of US\$6,125,035, whether held by those persons or by Disney or Kensington;
- (ii) a freezing order was made in respect of bank accounts with RBS International and RBS Guernsey of Seed, Ocean, Heros Global Marketing, Mr Garrett, Mr Stockdale, or Disney or Kensington on behalf of those persons and account no. 56156825;
- (iii) exceptions were ordered in usual form;
- (iv) disclosure orders were made against Disney, Kensington and the two banks requiring disclosure, within three business days of service of the order, of assets and accounts of Seed, Ocean, Mr Garrett and Mr Stockdale and account no. 56156825.

15. The words “within three business days of service of the order” are underlined, because the order was made in November 2002 and over a year later no disclosure has yet taken place. Following the Bailiff’s order on 22 November 2002, the disclosure order has been stayed pending final determination of the Defendants’ application to discharge the order.

16. On 10 January 2003 the thirteen Plaintiffs and Mr Steven van der Waal started substantive proceedings in the Netherlands. The translation we have seen is not a good one, but it is possible to ascertain from it the main elements in the Plaintiffs’ case, which are:

- (i) the contracts with Ocean and Seed are null and void, because
 - (a) Ocean and Seed were not licensed by the Dutch authorities, and the contracts were therefore in breach of Dutch statute law;
 - (b) The contacts were obtained by “deceit and abuse of the circumstances”;
- (ii) the Plaintiffs are entitled to restitution (either independently or by way of damages) of sums paid by them to Seed (less any sums received from Seed) plus any profit declared by Seed and interest.

The Plaintiffs rely on 25 exhibits to their formal claim, some of which are in evidence before this Court.

17. There appear to have been two different forms of agreement used by Seed, the first based on membership of Seed’s purchase scheme, and the second based simply on treating Seed as the Plaintiffs’ agent in making purchases. In this judgment we will refer only to the second form of agreement. This is printed in a font size so small as to be almost illegible. Some of the terms of the agreement provide as follows:-

- (i) Seed can charge and require payment of Transaction Fees on each purchase by the Plaintiff at whatever rate Seed may notify from time to time (Clause 6).
- (ii) Seed can require the Plaintiff to pay deposits to Seed at whatever rate Seed may determine in respect of each purchase by the Plaintiff. Deposits are non-refundable, unless Seed is unable to secure the commodity to be purchased (Clause 7(a)).
- (iii) If any balance of a purchase price remains unpaid when due, the Plaintiff forfeits all rights to any deposit or other moneys paid to Seed in request of the purchase, and this also applies if the Plaintiff cancels any purchase (Clause 7(b) and (c)).
- (iv) Seed can hold any proceeds of any sale by the Plaintiff and will not be liable for any interest on such proceeds (Clause 8).
- (v) The Plaintiff is to be solely responsible for verifying on delivery (defined as delivery ex cellars or ex storage) the merchantability and fitness of any commodity purchased, and has only 48 hours from delivery to notify a claim or defect; after 48 hours all claims are

barred. The Plaintiff releases and agrees to indemnify Seed and to hold Seed harmless in request of any such claim (Clause 9(a)).

- (vi) All disputes are to go to arbitration in the Cayman Islands, and the Plaintiff is to pay 50% of the costs (even if the Plaintiff succeeds in full): Clause 18(g).
- (vii) Previous transactions are to become subject to the same terms, and any funds standing to the Plaintiff's credit with Seed are not to be called for until after 12 months from the date of the most recent purchase. (Clause 21).

18. Apart from the terms of the forms of agreement, the main elements in the Plaintiffs' claim based on the defendants' business methods appear to be:

- (i) The Plaintiffs were subjected to high-pressure salesmanship in which the low price of wine relative to its quality was emphasised (though in fact the wine was over-priced), and the Plaintiffs were misled as to the extent of their potential liabilities.
- (ii) The methods of such salesmanship were illustrated by Ocean's Training Manual 2000. In this manual, American doctors and dentists were described as being persons who "have large amounts of disposable income who tend to spend their money first and ask the questions later". The sales were made by persons telephoning into the U.S.A. from Canada or the Netherlands. The methods of sale recommended in the manual can be illustrated by the following:

"3.3 HYPE PITCHES

A hype pitch is used to create excitement and urgency. It is a proven fact that our clients are greedy and easily excited, they buy through their emotions and justify through rationalisation.

When doing a hype, the loader must sound extremely excited, as this in turn will excite the client into adding to the account in order to take advantage of this very lucrative trade. Remember excitement sells."

It is said by Seed that this manual was little used, and withdrawn quite soon. However, the methods set out in the manual tally with the methods described by the Plaintiffs.

- (iii) Support is given to the Plaintiffs' account of how they were treated by Ocean and Seed in a statement provided by Mr Philip Beesley to another firm of Dutch advocates, Loyens & Loeff. Mr Beesley was employed by Ocean from February 1999 until May 2001 as a portfolio manager. We refer to the following extracts from his statement:-

“My job was to call American investors. These people were all doctors and dentists. The system worked as follows. We had to persuade these people to invest a \$1,000 in wine contracts. Once these people had deposited \$1,000 they would receive a contract note on which it appears that they had placed an order, that they had made a deposit of \$1,000; and that there would be an unpaid balance, depending of the contract value. The unpaid balance was something we did not tell the investors about beforehand, they would find that out from the contract. We just told them that we advised them to invest in wines and that there would be a profit if we could sell the wines for them.

From what I understood at that time, the investors deposited their investments in a bank account in Rotterdam, from which the monies were transferred to bank accounts in Cyprus and Guernsey.

According to the contract that the investors have to sign, the investment can not be sold for the first 12 months. Apart from that, the contract can only be sold if the unpaid balance is fully paid.

We would call these investors again after a few months. The purpose of these next calls would be to persuade them to invest more money. Only if they agreed to invest more money, we would let them know that we could sell their contract with a profit, which profit could vary from 2 till 10%. The profit would only exist on paper since it would be used as a deposit for the new contract. The contract value of the new contract would be higher than the first contract value.

Based on the procedure described above, it would not be possible for an investor to make the investment liquid. This would simply be impossible, because there would always be an unpaid balance if the investor was not prepared to pay more money. And as long as there is an unpaid balance, it would not be possible to sell the contract and therefore to make the contract liquid. If the unpaid balance was not received in time, the investor would forfeit his investment. This would put pressure on the investor to make additional payments. Furthermore, as mentioned above, the profits would not really exist. The employees of Ocean would be able to make up that the contract could be sold with a profit.

Only the investors who demanded their investment back, thereby supported by letters and actions from lawyers, would have a chance to receive the invested money back. Apart from that, it was the policy not to make any contract liquid or to transfer any profits.

I remember that there was a yearly tax audit by the Dutch tax authorities. Before the Dutch tax authority visited the company, the employees were instructed to shred all the statements of the clients' accounts.

Whether or not the wine that is purchased by the investors, is really purchased by Seed, on behalf of the investors, is not really clear. There appears to be an Australian by the name of Bob Middlemass, who is a wine purchaser. In November 2001 he purchased a great number of new wines. However, that amount of wine would certainly not be enough to settle all the transactions for all the investors. Furthermore, it appears that the investors bought wine which does not even exist at the time of the entering into the contract. Therefore, wines are purchased for the year 2008, and 2009.

Most of the employees were kept in the dark by the management of Ocean about the scope of the activities of the organisation.”

“The investors are not really told what they are entering into. They are misled and they have no idea what they are committing themselves to. For instance, the investors do not know that after having deposited \$1,000 there would be an unpaid balance and that they would have committed themselves to pay the full contract value. This contract value could amount to several million dollars.

After two years of employment I came to the conclusion that the investors were disinformed and deceived and that the business that was run by Ocean was not legitimate. Therefore I decided to leave the company.

You are free to submit this statement to any court proceedings in relation to Ocean and or Seed.”

As we have said, this evidence from Mr Beesley provides direct support for the case put forward by the Plaintiffs.

However, subsequently the defendants submitted affidavits from Mr Beesley retracting and contradicting his previous statement. It appears from his subsequent evidence that he took with him when he left Ocean a “blue book” containing details of about 400 – 500 of Seed's clients. He and his brother (who had also worked for Ocean) used the blue book in South Africa in order to approach Seed's clients in the U.S.A. and to persuade them to invest with the Beesleys instead of Seed. It is not clear whether the subsequent affidavits of Mr Beesley resulted from Seed's concern about the use by him of Seed's records of their

clients. At this interlocutory stage no conclusion as to the truth or otherwise of his statement on the one hand, or his affidavits on the other, could be reached.

(iv) Mr Hendrick, one of the Plaintiffs, alleges in his second affidavit that Seed sent to his attorney a copy of a fax allegedly sent by Mr Hendrick to Seed, which was a forgery, intended to bolster Seed's case. Documents exhibited to Mr Hendrick's second affidavit appear not to have been included in the files before this Court.

(v) Mr Kaplowitz, also one of the Plaintiffs, in his second affidavit, said (inter alia) this:

“(3) I do not deny that on November 20, 2001, I signed the Wine Programme Agreement. However, I did so in order to recuperate my principle investment along with profits promised me *on multiple occasions* by Chris Els, Craig Garrett, and Alun Williams in response to my multiple demands to allow my investments the liquidity that I was assured they would have.

(4) I received the contract H402 and schedule of payments for the first time on July 19, 2002, although it was dated October 29, 2001. I am in possession of the original documents and cover letter dated July 29, 2002. I immediately complained by telephone to Mr Els and later to Mr Williams that I had never been informed as to the long-term nature of the agreement, nor of the biannual necessary deposits required. In addition, I complained that I never was informed that I was purchasing contracts to *future rather than existing wine*, as never before, to my knowledge, had been the case. Furthermore, I complained that when I signed the Wine Programme Agreement for the Italian wines, that I was told that by Easter, 2002 all my money would be reimbursed me, which never occurred. Moreover, no schedule of payments were forwarded to me at the time of signing, rather they were forwarded for the first time in July 2002 as stated above. I cannot conceive how the contract note and schedule of payments could have been issued nearly a month *prior* to my signing the agreement and not informing me the true nature of said contract until *eight months later*.”

(vi) On 24 January 2003 the Dutch Financial Markets Authority issued a public warning on the Internet concerning Seed, Ocean and the two Cupidus companies. The warning is said also to have been sent to the Guernsey Financial Services Commission. See the third affidavit of Mr Hoek, paragraphs 7 – 9.

(vii) On about 17 January 2003 Ocean's offices in Rotterdam were raided by the Dutch police, and a report has been sent by the police to the public prosecutor; see Mr Hoek's third affidavit, paragraphs 10 – 11.

(viii) There is a lack of evidence from Seed showing, for example,

- (a) whether wine has in fact been bought by Seed, and delivered in sufficient quantities to perform the alleged contracts with their clients;
- (b) what has happened to the moneys paid to Ocean for Seed by the Plaintiffs and the many other clients of Seed;
- (c) any accounts of Seed or Ocean;
- (d) what has happened to the moneys paid for the purchase of loan notes of Optidisc or Cupidus.com (Turks & Caicos) Ltd or shares in The Wine Corporation Limited.

(ix) Mr. E. G. Chappell, an attorney practising in Ohio and Michigan, states in his affidavit that as such an attorney he believes that

- (a) Ocean made unauthorised investments on behalf of his client Dr. DeMichiei and unlawfully refused to release profits to his client, and
- (b) "Ocean's "product" involves the sale of an unregistered security under state and federal law in the United States of America."

Advocate A. D. Laws who appeared for the Plaintiffs before us indicated that the authorities in some of the States of the U.S.A. have taken an interest in the activities of Ocean and Seed, but that no reference has yet been made to the Securities and Exchange Commission or other Federal authorities.

(x) As already mentioned, when Mr van der Waal brought arrest proceedings against Ocean and Seed in The Netherlands, Seed and Ocean provided a bank guarantee to Mr van de Waal so as to remove the arrest. Mr Paul Freeman stated in his first affidavit, paragraph 9, that this was because:

"The injunction had the potential severely to disrupt both Seed's and Ocean's business."

Further, Mr Freeman in paragraph 18 of his prior affidavit, stated that a freezing order was obtained ex parte in the Royal Court on 13 September 2002 against Seed, Ocean and the Royal Bank of Scotland by Dr. Humphrey, another of Seed's clients. Mr Freeman stated that:

"The timing of that Order was crucial and potentially very damaging to Seed as Seed was in the final stages of concluding an important commercial transaction with its principal wine supplier."

Accordingly Seed settled with Dr. Humphrey without admission of liability. Given the large sums invested with Seed by the Plaintiffs, and it can be presumed by Seed's 2,000 other clients, it is noteworthy that when individual clients have sued Ocean and Seed, Seed has found it necessary to settle their claims.

(xi) Ocean's activities on behalf of Seed required a licence under the investment and securities laws of the Netherlands. They were not licensed, and accordingly the contracts were a nullity and unenforceable.

19. We emphasise again that this Court cannot at this stage reach any conclusion as to the correctness or otherwise of the allegation, against Ocean and Seed.

20. We now turn to the Deputy Bailiff's conclusions and the issues which he had to decide. It was for the Plaintiffs to establish that

- (a) they had a good arguable case against Seed;
- (b) there was a real and sufficiently serious risk of dissipation of Seed's assets in Guernsey, and
- (c) it was just and convenient in all the circumstances for the freezing and disclosure orders to be made.

In so far as Seed relied on the Plaintiffs' failure to make proper disclosure of relevant facts to the Bailiff, it was for Seed to establish this. In paragraph 190 the Deputy Bailiff stated that

“The onus was upon [Seed] to satisfy the Court that it was right to set aside the Order or discharge the disclosure provision.”

In our judgment, in so far as burden of proof was material, the burden of upholding the Order was on the plaintiffs. To this extent we consider that the Deputy Bailiff was in error, and accordingly it is the task of this Court to exercise the discretion afresh. But we follow the Deputy Bailiff's analysis of the facts and do not attempt any fresh analysis except in so far as his analysis was challenged by Miss Ozanne before us.

21. It appears that Advocate Jason Morgan, who appeared below for Seed, challenged the grant of both the freezing order and the disclosure order on the basis that the plaintiffs had failed to establish the necessary elements as set out in paragraph 20 above. He also challenged the grant of both orders on the ground of non-disclosure by the Plaintiffs of all relevant facts to the Bailiff; but as paragraph 211 of the judgment shows, in the end Mr Morgan “conceded that there had been adequate material disclosure to the Bailiff when viewed in the round and he discontinued this line of argument.”

22. The Deputy Bailiff reviewed the evidence before him at length. He dealt first in paragraphs 12 – 49 of his judgment with the information which was before the Bailiff in November 2002. In paragraphs 52 – 72 he dealt with the procedural history between the Bailiff’s order and the matter coming before the Deputy Bailiff in May 2003. Then in paragraphs 73 – 154 he reviewed the affidavit evidence before him which had not been before the Bailiff in November 2002. In paragraphs 155 – 163 he reviewed the proceedings brought by the plaintiffs in the Netherlands, and observed that though pre-judgment arrest orders could be obtained in the Netherlands, it is not possible there to obtain a disclosure order before judgment, except for the usual discovery of documents relevant to the issues in dispute. In paragraphs 164 – 168 he referred to the opinion of the Netherlands Board of Securities expressed in November 2002 that Ocean acting as agent for Seed had required a licence from the Board to promote the wine and other investments, and to the public warning published on the Board’s website on 24 January 2003 warning investors against dealing with Seed, Ocean and two other associated companies, because those four companies were acting in breach of Netherlands investment legislation without a necessary licence. In paragraphs 170 – 185 he dealt with certain contracts on which Seed relied as showing that it had contracted to purchase wine.

23. The Deputy Bailiff dealt with the good arguable case test in paragraphs 270 – 283 of his judgment. He concluded that the Bailiff had ample evidence before him to establish this, and that the position before the Deputy Bailiff was the same. We agree. Miss Ozanne made no serious challenge to this conclusion, and it is not necessary for this Court to spell out again the considerations which led the Deputy Bailiff and lead us to this conclusion.

24. The Deputy Bailiff dealt with the risk of dissipation of assets test in paragraphs 284 – 295. He concluded in paragraph 288 that there was ample evidence before the Bailiff on which it could be held that a real risk of dissipation had been established, and in paragraph 295, on the basis of the further evidence before him, he reached a similar conclusion. We agree. Again Miss Ozanne made no serious challenge to this conclusion, and we therefore do not set out at length the factors which have led the Deputy Bailiff and this Court to this conclusion.

25. The Deputy Bailiff held in paragraphs 296 – 300 that the just and convenient test under the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 had been satisfied before the Bailiff and before him. We agree, and for the same reason as before do not repeat the considerations which have led this Court to the same conclusion.

26. Accordingly we hold that the Deputy Bailiff was right to keep the freezing order in force and not to discharge that order. Indeed Miss Ozanne did not appear to seek the discharge of that order.

27. Miss Ozanne’s primary argument was directed to the disclosure order. As appears from paragraphs 188 – 189 the scope of the disclosure order sought by the Plaintiffs was limited to disclosure to them of:

- “1. (i) Copies of all documents and records in the possession or control of RBS International relating to the Specified Bank Account plus
 - (ii) Copies of all documents and records in the possession or control of RBS International relating to any other account held by Seed;
2. Copies of all statements, details of transfers in and out of the account(s) and a copy or copies of the mandate(s) held by RBS International in so far as not covered by 1 above.”

28. The issues argued by Miss Ozanne on behalf of Seed on this appeal were twofold:

- (i) that there should be no order for disclosure at all; and
- (ii) that the disclosure order should not have been made in terms which go wider than those of the freezing order, on the grounds that there is no jurisdiction in the Royal Court to make a disclosure order wider in ambit than is required for the policing of the freezing order, or, if there is such jurisdiction, in the present case there is no basis for making such an order with a wider ambit.

29. It is convenient at this point to quote the terms of the Deputy Bailiff’s order from paragraph 330 of his judgment:-

“330. Order in relation to the freezing of the assets of Seed and disclosure of information and documents by RBS International.

1. The freezing order will remain in place.
2. RBS International must produce to the Applicants’ Advocate:
 - (i) Copies of all documents and records in the possession or control of RBS International relating to the Specified Bank Account, plus
 - (ii) Copies of all documents and records in the possession or control of RBS International relating to any other account held by Seed;

- (iii) Copies of all statements, details of transfers in and out of the account(s) and a copy or copies of the mandate(s) held by RBS International in so far as not covered by 1 above.”

Provided always that the information to be provided by RBS International shall be limited to such information as will enable the Applicants to discover the nature and whereabouts of assets directly and indirectly owned by Seed, Ocean, Mr Garrett or Mr Stockdale.

If RBS International is in doubt as to whether information ought to be disclosed for the purposes of discovering the nature and whereabouts of the assets of Seed, Ocean, Mr Garrett and Mr Stockdale or the extent to which documents may need to be edited then it may seek directions from the Court.

3. RBS International must produce the information and documents by 17 November 2003.
4. Subject always to this order, the other orders granted by the Bailiff shall remain stayed until 31 December 2003 or until further order.”

30. The Deputy Bailiff set out Mr Morgan’s arguments on Seed’s behalf in paragraphs 212 – 233, Mr Laws’ arguments for the Plaintiffs in paragraphs 247 – 256, and the reasoning which led him to make the above order in relation to disclosure in paragraphs 301 – 329. As the arguments had developed before him, the main issues appeared to be:

- (i) whether a disclosure order can or should be made where the plaintiff’s claim is not a proprietary one and merely a claim for damages, or some other personal and non-proprietary claim;
- (ii) whether a disclosure order can or should be made going beyond the ambit of the freezing order to which it is ancillary, and beyond the ambit of what is required to police the freezing order.

31. Because it falls to this Court to exercise the discretion under Part I of the 1987 Law afresh, we will consider the arguments put forward below by Mr Morgan, and before us by Miss Ozanne, in some detail.

32. Before considering those arguments, we should state that it is common ground that:

- (i) there is no proprietary claim at present made by the Plaintiffs against Seed; and
- (ii) though evidence of fraud has been presented to the Court, at present that evidence would not be sufficient to enable a Bankers Trust v. Shapira order [1980] 1WLR 1274 CA to be made; nor was the order sought on the basis of Norwich Pharmacal [1974] AC 133 HL (E).

We note that the allegations of fraud form part only of the totality of the claim in the Netherlands proceedings, and that in any event allegations of fraud are not a necessary condition for the grant of interim freezing or disclosure orders.

33. We start with the position in English law, and with the decision of Robert Goff J. (now Lord Goff of Chieveley) in A v C [1981] 1QB 956. He referred to the jurisdiction of the English courts to make freezing orders. He emphasised that the principle underlying this jurisdiction is “the prevention of an abuse”, the abuse lying in the ability of a defendant to move his assets from country to country so as to avoid the risk of having to satisfy any judgment which may be entered against him in pending proceedings. In 1981 Lord Goff was mainly considering cases in which a foreign resident in England and Wales might be able to remove his assets from that jurisdiction. Subsequently in many cases it has been held that the jurisdiction may be exercised in aid of pending proceedings in another jurisdiction, and that where appropriate it can be exercised so as to apply world-wide. But the underlying principle remains that stated by Lord Goff, the prevention of abuse.

34. Lord Goff went on to consider the jurisdiction to make disclosure orders. He emphasised that the Court should, where necessary, exercise its powers to order discovery so as to ensure that the freezing order jurisdiction is properly exercised, and thereby to secure the objective of the prevention of abuse. He derived this power from the English statutory provision enabling the English High Court to grant interlocutory injunctions (which may be negative or mandatory) “in all cases in which it appears to the Court to be just or convenient so to do.” See section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, replaced by the Supreme Court Act 1981, section 37(1).

35. Though Lord Goff decided A v C in 1981 at an early stage of the development of freezing and ancillary disclosure orders, in our judgment the principles he then stated remain apposite today, both in English Law and in Guernsey Law:-

- (1) the objective is the prevention of abuse;
- (2) the jurisdiction is a wide one, to make freezing and disclosure orders so far as necessary for the prevention of abuse;

(3) it is for the Court, in the light of the particular circumstances of each case, to decide whether or not to exercise its discretion to make a freezing order or disclosure order at all and, if so, how widely such orders should extend in order to achieve that objective.

36. Miss Ozanne argued that the jurisdiction is exercisable only in cases in which the plaintiff has a proprietary claim to recover the plaintiff's assets in the hands of the defendant, and not in cases in which the plaintiff has only a personal claim to recover damages or a liquidated sum from the defendant. In our judgment the authorities show that there may be an abuse where the defendant is faced with a personal claim, and that in such cases the abuse may need to be prevented just as much as in cases where the plaintiff has a proprietary claim. The essential question is whether there is an abuse to be prevented. Though it may be easier to show an abuse in the case of a proprietary claim, an abuse may nevertheless be shown in the case of a personal claim, as for example in the case of Republic of Haiti v Duvalier [1990] 1QB 202, in which the English Court of Appeal specifically considered the question whether freezing and disclosure orders should be made on the basis that the Haitian Republic had only a monetary claim. The Court had no difficulty in deciding, in the particular circumstances of that case, that a freezing order and a disclosure order should be made; and the Court followed its decision in Babanaft International Co. SA v Bassatne [1991] Ch.13 that such orders could be made to apply world-wide.

37. The English Court of Appeal in Grupo Torras SA et al v Sheikh Fahad Mohammed Al-Sabah et al (16 February 1994, unreported) was dealing with world-wide freezing and disclosure orders. But the observations of Steyn L.J. (now Lord Steyn) who delivered the main judgment deal generally with the relationship between freezing and disclosure orders. He stressed at page 7 that in such a case, unless the court could make a sufficiently wide disclosure order, a freezing order might be “a relatively toothless procedure.” Steyn L.J. held that the jurisdiction to order disclosure arose both from section 37 of the Supreme Court Act 1981 and from the inherent jurisdiction of the English courts. Though he made reference in that case to “the fight against transnational fraud”, we do not consider that the existence of the jurisdiction was founded on the ability to demonstrate fraud, whether transnational or not. In relation to the link between freezing and disclosure orders, he cited with approval the article by Mr Lawrence Collins (now Lawrence Collins J) on The Territorial Reach of Mareva Injunctions (1989) 105 LQR 262, at page 297:-

“In those cases where an effective order can be made, it is likely to be the disclosure order which will be the most useful in practical terms. If proper disclosure is made of assets abroad, the plaintiff will be in a position to make an application in the relevant foreign court for an attachment. If the foreign court is in a 1968 Convention Contracting State, it is likely that the courts of that State will exercise an Article 24 jurisdiction to make provisional orders in aid of proceedings in England. If the State is not a Contracting State, then the same result will follow

in those countries which would allow an attachment to be made in aid of proceedings pending in other jurisdictions; it may be that the number of such countries will be very small, and that in most countries it will be necessary to start fresh, parallel proceedings on the substance and obtain security in those proceedings.

The practical consequence is that it is really the Mareva injunction which is ancillary to the disclosure order, rather than the traditional relationship in which it was the disclosure order which was ancillary to the Mareva injunction. For the disclosure order will be the main remedy in England, and the Mareva injunction will, in the words of Nicholls L.J. in Babanaft, be a ‘holding’ injunction, to give the plaintiff time to apply to the relevant foreign court for appropriate orders of attachment or the like. Then an undertaking in the form required in Derby & Co. Ltd v. Weldon (No. 1), or a variant of it, will give the English court the power to control the plaintiff’s exercise of its right to seek attachments in foreign countries, in order to prevent tactical harassment of a defendant and to limit the plaintiff’s security.”

38. For our part we emphasise the words of Mr Collins which we have underlined in the second paragraph. It is the disclosure order which gives teeth to the freezing order. This applies as much to freezing orders limited to one jurisdiction, as it does to world-wide orders.

39. The second issue raised by Miss Ozanne was whether a disclosure order could be made in terms wider than merely what is required for policing a freezing order. In our judgment the power of the Court recognised in the English authorities is a discretionary power to make such freezing or disclosure orders as are necessary to prevent abuse. It is common practice to make a disclosure order with an ambit similar to the ambit of the associated freezing order; see, for example, Gee on Mareva Injunctions and Anton Piller Relief, 4th edition, Chapter 17.

40. In Derby v. Weldon (Nos 3 & 4) [1990] Ch. 65 the English Court of Appeal left open for later decision the question whether a disclosure order could go beyond the ambit of a freezing order, and Neill L.J. said this at pp. 93 – 94:-

“It may be open to argument in some future case that in certain circumstances a discovery order can be made with a wider ambit than the *Mareva* injunction to which it is ancillary. As at present advised, however, I remain of the opinion which I expressed in *Ashtiani v. Kashi* [1987] Q.B. 888 905 that the discovery order, if made at all, should not go further than the injunction. The basis of the jurisdiction to make an order for discovery was examined by this court in *A. J. Bekhor & Co. Ltd v. Bilton* [1981] O.B. 923.

It was there held by the majority of the Court that the order for discovery, being ancillary to the *Mareva* injunction, should not go beyond the ambit of the injunction. I do not find it necessary in this case to consider further whether, and, if so, in what circumstances, there may be exceptions to this general rule. I would only urge that in this field the court should scrutinise very carefully any submission that its powers are circumscribed more narrowly than the justice of the case demands. In the course of this appeal some reference was made to the fact that assets, like the Cheshire cat, may disappear unexpectedly. It is also to be remembered that modern technology and the ingenuity of its beneficiaries may enable assets to depart at a speed which can make any feline powers of evanescence appear to be sluggish by comparison.”

The words we have underlined need to be considered in the light of Lord Steyn’s observations in Gruppo Torras. They point to the need to ensure that both the freezing order and the disclosure order should be made in terms which will meet the needs of justice in the particular case, so as to prevent the abuse to which Lord Goff referred to in A v. C, an abuse greatly aided by the developments of technology and ingenuity to which Neill L.J. referred. Subsequently it has been held in England at first instance that after judgment or arbitration award the English Courts can extend the ambit of a disclosure order wider than the ambit of the associated freezing order directed to assets within the Courts’ jurisdiction: see Gidrxslme Shipping Co. Ltd. v. Tantomar-Transportes Maritimos Lda: The Naftilos LS [1995] 1 WLR 299 Colman J. It seems to us that the jurisdiction to make disclosure orders with a wider ambit than that of the associated freezing orders is recognised in English law, though the need for any such disclosure order will have to be clearly established on the facts of the particular case.

41. So far we have considered only the position in English law. Turning to Guernsey law, section 1 of The Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 provides a general power to make interim injunctive orders, whether negative or mandatory, and whether or not proceedings have been or are to be instituted before the Royal Court (s. 1 (7)), provided that the Royal Court is satisfied that it is just and convenient so to do (s. 4). In exercising this jurisdiction the Courts of Guernsey need to keep in mind the special circumstances of a small island community and the needs of the financial services established in the Island, particularly the need to maintain the highest standards of probity in circumstances in which legal proceedings concerning funds held in Guernsey are likely to be pursued in larger jurisdictions rather than in Guernsey. In this regard it is material to have regard to the similar considerations which led the Jersey Court of Appeal to decline to follow the decision of the House of Lords in The Siskina [1979] AC 210 in Solvalub Ltd v. March Investments Ltd 1996 JLR 361. There the Jersey Court of Appeal held that a freezing order could be made in respect of assets in Jersey in circumstances in which the substantive proceedings would be in another jurisdiction and there was no cause of action arising in Jersey. In the judgment of the court at

pages 369 – 370 Sir Godfray Le Quesne JA, after concluding that previous cases in Jersey pointed to the existence of a power to grant a freezing order in aid of proceedings in a foreign court said this:-

“This, as it seems to me, is what one would have expected to find in the circumstances of this jurisdiction. Jersey is an important financial centre. Geographically it is very close to the United Kingdom. For practical and especially for financial purposes, it is very close to many more countries all over the world. There are dozens of funds which are constantly encouraging people who have money to place it here. Every now and again a figure is quoted, ever rising, of the total quantity of funds which are deposited in Jersey. The figure is enormous.

If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of the duty of comity which courts in different jurisdictions owe to each other. Not only so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success. These local circumstances, in my judgment, explain why the law on the particular point under consideration should have developed as it appears to have developed in the authorities to which I have referred.”

42. Guernsey is in this respect similar to Jersey, and we are certain that the considerations set out by Sir Godfray Le Quesne should equally underlie the exercise of the Guernsey Courts’ jurisdiction to make interim orders, including both freezing and disclosure orders, under section 1 of the 1987 Law. In so far as earlier cases at first instance in Guernsey have proceeded on a different basis (for example, News International PLC et al v. Michael Clinger et al 10 May 1996, Royal Court at page 3G), in our judgment in future the Courts of Guernsey should, when in the circumstances of a particular case justice requires the making of appropriate freezing and disclosure orders, proceed to exercise the discretionary jurisdiction to make such orders.

43. Miss Ozanne also sought to argue the case on the footing that what this Court is concerned with is the confidentiality of RBS (International) vis-à-vis its customer, Seed, so that the court should pay primary attention to the rights of the bank as an outside party not involved in the substantive matters in issue in the action. This point is in our judgment not well-founded. RBS (International) have taken no part in these proceedings, and are content both that Seed should argue its own case, and to abide by such order as the Guernsey Courts may make. The real issue between the parties is whether disclosure of assets of the Defendants should be ordered.

44. In the light of this discussion of the principles to be applied when the Courts of Guernsey are considering applications for disclosure orders, we turn to the issues arising in this case at this stage. The circumstances are fully set out in the Deputy Bailiff’s judgment, and are summarised in the brief summary above.

45. The first question is whether in Guernsey there is jurisdiction under Part I of the 1987 Law to make a disclosure order, ancillary to a freezing order, where there is no proprietary claim. In our judgment it is clear that the jurisdiction exists. The power to grant interim orders created by the 1987 Law is not to be limited to support of proprietary claims, though no doubt it may be easier to persuade the Royal Court to grant a disclosure order where the claim is of a proprietary nature. The Guernsey Courts should follow in this regard the approach taken in the Republic of Haiti case by the English Court of Appeal.

46. The second question is whether a disclosure order should be made in the circumstances of the present case. In our judgment the arguments in favour of the making of some form of disclosure order are, in such circumstances, overwhelming. Seed has or has had assets in Guernsey. Seed has had large sums in the Netherlands which are no longer there. Seed has the ability to move sums of money round the globe at a moment’s notice. Without a disclosure order, the freezing order would be “toothless”, as Lord Steyn said in Grupo Torras.

47. The third question is whether there is jurisdiction in the Guernsey Courts to make a disclosure order with an ambit wider than that of the associated freezing order. In our judgment Part I of the 1987 Law is in general terms, and bestows on the Guernsey Courts a jurisdiction to make disclosure orders where it is just and convenient to do so. The statutory jurisdiction is not to be limited by judicial fiat. That does not mean that the grant of disclosure orders wider in scope than the associated freezing orders is to be commonplace. Clearly a strong case must be made out by the applicant before any such wider disclosure order is made.

48. The final question is whether the disclosure order made by the Deputy Bailiff ought to have been made in the circumstances of this case. The disclosure order he made goes beyond the ambit of the freezing order to a relatively small extent. Instead of being limited to disclosure of information and documents relating to assets in Guernsey, it applies also to information and documents concerning transfers out of any accounts of Seed in Guernsey. It may therefore enable the Plaintiffs to know the first place to which money has been transferred by Seed, but no more. In our judgment, viewing the matter afresh and independently of the Deputy Bailiff’s decision, this limited extension of the ambit of the disclosure order is just and convenient and necessary to do justice as between the parties. The substantive proceedings are in the Netherlands. The Courts of the Netherlands have no power to order such disclosure. Large sums have been transmitted by these Plaintiffs and many other

clients of Ocean and Seed to the Netherlands, but little of those sums remains in the Netherlands. Funds have been transferred to (inter alia) Guernsey and Cyprus by Ocean and Seed. Seed has, as we have stated, the capacity to move money round the world at a moment's notice. If and insofar as moneys have been moved by Seed out of Guernsey, it is clearly in the interests of justice that the Plaintiffs should know, at the least, to which bank account or other place outside Guernsey Seed has moved its money. Further, though we make no criticism of anyone in this regard, there has been a serious delay in the making of a disclosure order, even though the freezing order dates from more than a year ago. Putting these factors together, in the light of all the circumstances already referred to, it is in our judgment essential that the order made by the Deputy Bailiff be confirmed and now put into effect, subject to two provisos which we include so as to provide for control by the Royal Court of the use to which disclosed information and documents may be put.

49. Accordingly we dismiss the appeal and uphold the order of the Royal Court, subject to the proviso that the disclosure order of 3 November 2003 be varied to provide expressly:

- (i) That the documents or information obtained pursuant to the said Disclosure Order are only to be used for the purpose of legal proceedings between the parties, unless the Royal Court otherwise directs; and
- (ii) That in the event that the said documents or information enable the Plaintiffs to commence new proceedings in a foreign jurisdiction, the Plaintiffs must first seek leave from the Royal Court to commence such proceedings, such application to be on notice unless the Royal Court otherwise directs.

RBS International are to produce the information and documents specified in the disclosure order by 12 noon on Monday 29 December 2003; and any application to extend that date would be made to the Royal Court, though no extension should be made other than in exceptional circumstances. The Defendants are to pay the Plaintiffs' costs on the standard recoverable basis in respect of the proceedings in this Court, and in the Royal Court from 6 December 2002.

Postscript

50. We mention two points by way of postscript. The first is to emphasise that urgent interlocutory applications such as this one need to be dealt with expeditiously by the parties and the Courts. We make no criticism of the parties to this application and appeal or of the Royal Court. We simply wish to stress that the Royal Court will need to lay down strict and short timetables for any such interlocutory applications. In saying this we naturally recognise the growing pressures on the full time judiciary of Guernsey.

51. The second point (again made without any criticism directed to this case) is that we hope that a practice direction can soon be made to govern the way in which documents and authorities are presented to the Courts. Pending any such practice direction, we trust that the following will be regarded by the legal profession in Guernsey as the appropriate way to present documents and authorities:

- (i) Original documents submitted in connection with appeals, applications for leave to appeal and interlocutory applications should be dated and signed by the Advocate or the individual making or opposing the appeal or the application, and originating the document.
- (ii) Files of documents submitted in connection with appeals, applications for leave to appeal and interlocutory applications should have the pages numbered serially, and have at the front an index, indicating the page number of each document in the bundle or file.
- (iii) The aim of all parties to appeals should be to ensure that each relevant document should appear once, and once only, in the papers lodged with the Greffe and delivered to the other parties.
- (iv) A file (or section of a file) containing, in chronological order, copies of acts of court, judgments, pleadings, the notice of appeal or application for leave to appeal, and other formal documents made or served to date in the proceedings in which the appeal or application for leave to appeal is made.
- (iv) The transcript of the proceedings before the Royal Court, or such parts (if any) of the transcript as have been agreed to be placed before this Court.
- (v) A file (or section of a file) of affidavit evidence, with the exhibits to each affidavit, in chronological order. If the same document is exhibited to more than one affidavit, it should be included only once, and in other places should be replaced by a sheet bearing the number of the exhibit and stating where the document is included in the file.
- (vi) A file (or section of a file) of relevant authorities and statutory provisions containing: in the first part, the Guernsey authorities and statutes; in successive and separate parts, the authorities and any statutes from each other jurisdiction. In each part the authorities and statutory provisions should be in chronological order.
- (vii) If the respondents or their Advocate wish to add to the documentation in the file or files prepared by the appellants or applicants or their Advocates, such documents (including authorities or statutes) should be added to those files in the appropriate places, without duplication.