Eckman v Sidem

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	21 July 2010
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Text

[2010] JRC 135

ROYAL COURT

(Samedi Division)

Before:

W. J. Bailhache, **QC.**, Deputy Bailiff, **and** Jurats Le Cornu **and** Nicolle.

Between
Carl Eckman
Plaintiff
and
Sidem International Limited
First Defendant

and

Patrick Michault

Second Defendant

Advocates R. J. C. Wakeham **and** P. M. T. Tracey **for the Plaintiff.**

Authorities

Abdel Rahman v Chase Bank (CI) Trust Company Limited and Five Others [1990] JLR 59.

Rahman Showlag v Mansour and First Union Corporation SA [1994] JLR 269.

In the Matter of the Curatorship of X [2002] JLR 259.

Representation of T N Moustras and K Moustras [2006] JLR 491.

Wallersteiner v Moir [1974] 3 AER 217.

Patton v Burke Publishing Co Limited [1991] 2 AER 821.

Lever Fabergé v Colgate Palmolive Co [2005] EWHC 2655.

Animatrix Limited and Others v O Kelly [2008] EWCA Civ 1415.

Hymin and Others v A Couch [2009] EWHC 1040.

Deputy Bailiff

THE

1 This case has a long and unhappy history. The detail of it is set out in the Royal Court's judgment of 7 th December, 2009. The Court was then sitting on appeal from a decision of the Master who had ordered that the plaintiff's claim against the second defendant be dismissed on the ground of inordinate and inexcusable delay in the prosecution of the action. The Court allowed the appeal and reinstated the claim. In addition, the second defendant was ordered to provide further particulars within 28 days. The matter was referred back to the Master so that a strict time table could be set down to bring the matter to trial.

2 Pursuant to those orders the plaintiff issued a summons before the Master on 14 th December, 2009. He sought specifically orders that he be given leave to file an amended Order of Justice and that the proceedings which he had commenced be consolidated with another Pauline action issued by him against Capita Trustees Limited (“Capita”), which had allegedly received a number of substantial payments from the first defendant.

3 The second defendant withdrew his instructions from his lawyers in November 2009; he

failed to file the further particulars due on 2 nd December, 2009, and the plaintiff obtained an Unless Order, granted on 14 th December by the Master who adjourned the application for directions given the second defendant's apparent withdrawal from the jurisdiction. The second defendant failed to comply with the Unless Order and as a result the answer was struck out. The plaintiff amended his Order of Justice with leave, remedying some of the defects in the previous proceedings, the second defendant failing to appear at the application to amend. The amended Order of Justice was served on the second defendant on 28 th January, 2010. No answer has been filed in response to it, and this judgment arises out of the plaintiff's application for judgment in default of defence.

4 The prayer to the Order of Justice seeks the following:-

> *"1. A declaration that the First Defendant is the alter-ego of the Second Defendant and that all of the above said transfers were undertaken with the intention and for the purpose of defeating the Plaintiff's claim against the First Defendant in a fraud against the creditors of Sidem such that the said transfers be rescinded or set aside and repaid by the Second Defendant to the First Defendant as follows:-*
>
> *(a) The sum of US$489,469.82 representing payments made from the First Defendants bank account between 15th April, 1996, and 12th August, 1999, in 28 payments to the credit of the Second Defendant's personal American Express account, be paid by the Second Defendant to the First Defendant.*
>
> *(b) The sum of US$1,354,860.36 representing payments made from the First Defendant's bank account between 29th March, 1996, and 27th March, 2000, by the Second Defendant for his personal benefit be paid by the Second Defendant to the First Defendant.*
>
> *(c) The sum of US$1,579,409.40 representing payments made from Siden to the trustees of the second trust be paid by the Second Defendant to the First Defendant.*
>
> *2. The Second Defendant pay interest on the money set out in above paragraphs 1 to 3 at the rate of 10% or at the Court rate or at such other rate as the Court deems fit accruing from the date when such monies were paid away from the First Defendant until the date of payment to the First Defendant by the Second Defendant".*

5 There were then claims for costs and other relief.

6 Advocate Wakeham advised us on 4 th March that the first defendant is a company incorporated in Ontario, Canada. It has not been declared bankrupt anywhere and he said it is believed to be in good standing. He asked for the declarations and the money judgments in default of appearance by the defendants. On that day, the Court ordered that the second defendant should repay the first defendant:-

(i) the sum of US$489,469.82, as set out in Prayer 1(a) of the amended Order of Justice;

(ii) the sum of US$1,354,960.36 as set out in clause 1(b) of the amended Order of Justice;

(iii) interest on the two sums above was also ordered at the Court rate until payment, together with the costs of and incidental to the application on 4 th March calculated on a standard basis. In addition, the Court ordered the second defendant to pay the plaintiff's costs of £47,503.95, which was the subject of Prayer 4 in the amended Order of Justice.

7 The remainder of the application was left over for further argument.

8 The Court sat further on 17 th March when Advocate Tracey appeared for Mr Eckman and sought to persuade us that a declaration should be granted as claimed in the prayer of the amended Order of Justice that the first defendant was the alter-ego of the second defendant and that the transfers which gave rise to the money judgments were made with the intention of and for the purpose of defeating the plaintiff's claim against the first defendant in a fraud against the creditors of the first defendant. This application therefore gives rise to the issue as to whether it is appropriate for this Court to make a declaration in default of appearance by the defendants, and in circumstances where it has only affidavit evidence before it, and where the deponents have not been subject to any cross examination.

9 The thrust of the application for the declaration was that it would be just to grant it. In support of that proposition that that was the appropriate test, reliance was placed on a number of cases. The first of these was *Abdel Rahman v Chase Bank (CI) Trust Company Limited and Five Others* [1990] JLR 59 where the Court made a declaratory order that the plaintiff's marriage to her late husband was valid because to deny that declaration ***"would be to impose injustice upon the claimant"*** (see page 70, lines 15 to 18). The facts of that case however were quite different. In that case, there were proceedings both before the Courts of Lebanon and before the Royal Court where the claim was advanced that the plaintiff's marriage to her late husband was invalid. Those claims came on for adjudication at broadly the same time, and in the circumstances the proceedings on the marriage in the Royal Court were stayed against undertakings of all the parties before the Royal Court to abide by the decision of the Court of Appeal in Beirut on the same issue. When the widow succeeded in the Court of Appeal in Beirut, the other parties attempted to appeal to the Lebanese Cour de Cassation. That was in breach of their undertakings, and occurred some two years after those undertakings were given during which time the proceedings in the Royal Court had been stayed. It is on that basis that the Royal Court concluded that it would be unjust to the widow not to make the declaration which she sought, and it is also to be noted that the case had been fully argued both in the Royal Court and in the Courts of Lebanon.

10 The plaintiff before us also relied upon the case of *Rahman Showlag v Mansour and First Union Corporation SA* [1994] JLR 269. In that case, where again both plaintiff and defendants were represented, the plaintiff sought to rely upon proceedings in the High Court of England before Mr Justice Hoffman where the Court had found in the plaintiff's favour after a contested hearing. Accordingly, the plaintiff sought injunctions from the Royal Court preventing the defendants from dealing with the money in question and declarations that the first defendant was liable to account to the plaintiff for the money and any profits arising out of its use. The Court's judgment addressed the issue as to whether it was proper to grant the declarations given that no Jersey Court had made any findings of fact on the ownership of the money.

11 For reasons which are not material to the matter before me now, the Privy Council had already held in the *Rahman Showlag* case that the judgment of Mr Justice Hoffman was determinative of the issue of fact which was before the Royal Court in Jersey. As a result, the Royal Court felt able to make the declaration which was sought by the plaintiff. While Sir Philip Bailhache, Deputy Bailiff, as he then was, was not prepared to attempt the task of describing the Royal Court's jurisdiction to make declaratory judgments without full argument, it was clear that the fact that the Pricy Council had determined that the English Court's judgment was binding on the facts was critical. The judge said:-

> ***"The jurisdiction of this Court to make declaratory judgments has not yet been statutorily or judicially defined.*** Without fuller argument, it would not be right for us attempt that task on this occasion. It is sufficient to state that the jurisdiction should be exercised with caution, but without hesitation where necessary to do justice between the parties. In our judgment this is a proper case in which to exercise our power to grant declaratory relief."

12 Again it is noteworthy that although the Court made its decision to grant the declaration on the basis that it was necessary to do so and to do justice between the parties, that was a case where the facts had been established, albeit not in the Royal Court but by a decision of the English Court which, in relation to the Royal Court proceedings, the Privy Council had decided was binding upon the Royal Court.

13 The next Jersey case which touches on the issue of declarations is *In the Matter of the Curatorship of X* [2002] JLR 259. That was a case in which the curator of X made a representation seeking a declaration as to X's testamentary capacity, the particular focus being in relation to a codicil made by X a year before the curator was appointed. X was still alive at the date of the proceedings.

14 The Royal Court conducted a review of the approach taken in the Courts of England and Wales and in the Courts of Scotland to the issue of the jurisdiction to grant declaratory relief. The focus of the jurisdiction in that particular case was whether it was appropriate to grant a declaration where the right at issue might be categorised as future or hypothetical. The interdict might have recovered capacity and made a further Will; indeed might have

had a lucid moment even without recovering capacity generally, as a result of which a further will might be valid. The Court noted that the action of declarator in Scotland is potentially very wide in scope, and in particular that the Scottish Courts did not appear to have become involved in technical considerations as to whether a right is future or hypothetical.

15 At paragraph 18 of the Court's judgment Birt DB said this:-

> ***"We think that the broad and flexible approach summarised above [referring to the Scottish approach] is preferable to the more structured and technical approach which appears to hold sway in England, which is based partly upon historical considerations which have no application in Jersey.*** The principles of Scottish law described above offer a sensible and convenient approach to the question of when the Court should agree to give declaratory relief and we hold that they represent the correct approach under Jersey law … in our judgment the Court should not become embroiled in a technical consideration of whether a matter can be categorised as a future or hypothetical right. The Court should adopt a broader approach and consider whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief."

16 That case, of course, was really addressing the question as to whether it was appropriate to introduce technical restrictions on the jurisdiction to grant declaratory relief, and in particular whether it was necessary to establish the existence of the future right so as to ensure that the Court was not asked to give declaratory relief in a hypothetical situation. In rejecting the English approach to matters of that kind, the Court has assessed that in Jersey a broad approach is to be taken, giving consideration to live practical questions with practical consequences. We propose to adopt that approach here.

17 Finally the plaintiff relied on in the matter of the *Representation of T N Moustras and K Moustras* [2006] JLR 491. In that case, the Representor sought a declaration that the debt underlying an *hypothéque conventionelle simple* had been repaid, and an order cancelling the *hypothéque*. The facts were that the respondents owned a property over which an *hypothéque* for a loan of £9,000 had been secured in 1955. The records in the Public Registry did not indicate that the loan had been repaid and the *hypothéque* remained therefore against the property. The Representors claimed that the loan had been repaid in the 1960's but were able to produce no evidence of this. The Court, having reviewed the importance of the accuracy of records in the Public Registry and considered the judgment of Birt, DB, in Re the *Curatorship of X*, approved the passage which we have cited above to the effect that the Court should adopt a broad approach and consider live practical questions with practical consequences.

18 Notwithstanding that the Jersey case law shows that the Courts will adopt a broad approach, it is not unhelpful to look at some of the significant English judgments on the granting of declaratory relief not least because they assist in identifying the problems which

the grant of a declaration can bring. One such problem was raised in the case of *Wallersteiner v Moir* [1974] 3 AER 217. In that case, the judge in Chambers granted the defendant declarations that the plaintiff had been guilty of fraud, misfeasance and breach of trust. On appeal, the plaintiff produced certain documents which he claimed gave him a defence to the counter-claim. The Court of Appeal held that the Court should only give a declaratory judgment when justice to the claimant could only be met by so doing. In general, the Court should leave until after trial the decision whether or not to grant declaratory relief and, if so, on what terms. Buckley L J stated, at page 251:-

> ***"I am more familiar with the practice in the Chancery Division than in any other Division of the High Court, but it is probably in the Chancery Division that more use is made of declaratory relief than elsewhere.*** It has always been my experience, and I believe it to be a practice of very long standing, that the Court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v Powell* ***where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the Court was a judicial act and ought not to be made on admissions of the parties or on consent, but only if the Court was satisfied by evidence.*** If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may ***be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently".***

19 Scarman L J said something similar at page 253:-

> ***"When what is sought is a declaration, there is the risk of irremediable injustice; the Court has spoken and words cannot be recalled even though later they be negative: "lescit vox missa reverti" the power of the Court to give declaratory relief on a default of pleading, of course, exists, but, for the reason crystallised by Horace in those four words of his, should be exercised only in cases in which to deny it would be to impose injustice on the claimant."***

20 Those extracts, expressed, inter alia, in the English language, emphasise how important it is that the Court should only grant declarations where it is satisfied that it is appropriate to do so on the evidence. There is also a clear indication that declarations were, at least in 1974, generally not to be granted where based on admissions or in default of defence. This is particularly so where the declaration sought was that the defendant had acted fraudulently.

21 The plaintiff relied on the case of *Patton v Burke Publishing Co Limited* [1991] 2 AER 821. In that case, the plaintiff was the owner of copyright in a work known as "neurological differential diagnosis". The defendants were publishers who had gone into receivership. The plaintiff claimed that by their actions the defendants were in breach of contract and had

shown an intention no longer to be bound by the agreement by which the plaintiff had conferred on the defendants a sole and exclusive right to print and publish his work. The plaintiff sought a declaration that the agreement had been determined by the defendant's breach and that the plaintiff was no longer bound to follow that agreement.

22 Millett J said this:-

> ***"It is not the normal practice of this Division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to turn the proceedings.*** That is a practice of very longstanding…[his Lordship then discussed the case of *Wallersteiner v Moir* ***which he described as providing a rule of practice not a rule of law, but a salutary rule which should normally be followed, although only where the claimant can obtain the fullest justice to which he is entitled without such a declaration]… in the present case it is my view that the fullest justice cannot be done to the claimant by omitting the declaration sought.*** His ***right to publish the work by offering it to a new publisher, and his right to offer to such new publisher any similar book which he may write in the future, would be seriously prejudiced by any contention that the present agreement with the Defendants was still subsisting."***

23 That case therefore assists the plaintiff in pointing to the need for the Court to consider whether the applicant for a declaration can obtain the fullest justice to which he is entitled without it. If that were not to be the case, then notwithstanding *Wallersteiner v Moir* it would be appropriate to consider the grant of a declaration.

24 The plaintiff also relied upon *Lever Fabergé v Colgate Palmolive Co* [2005] EWHC 2655, a patents case, and *Animatrix Limited and Others v O Kelly* [2008] EWCA Civ 1415, a copyright case, both of which applied the English judgments which we have mentioned above, and emphasised the need for the Court, when considering the grant of the declaration, to address its mind to whether justice will be done if no declaratory relief were to be granted.

25 Finally I should note the decision of *Hymin and Others v A Couch* [2009] EWHC 1040, where the orders sought included a series of declarations regarding the invalidity of share transfers and some corporate resolutions. Steven Smith QC noted the English position in these four propositions:-

> (i) That the rule that a Court should not grant a declaration except after a trial was only ever a rule of practice;
>
> (ii) That the rule should not be followed if following it would deny the claimant the fullest justice to which he is entitled;

(iii) That the rule is less strong since the coming into force of the civil procedure rules than it was when the rules of the Supreme Court held sway; and

(iv) That where the parties consent to (or agree not to oppose) the grant of declaratory relief and that consent forms part of a bona-fide commercial bargain entered into between them to avoid the need for trial, the Court is likely to consider it necessary to grant the declaration sought in order to do justice between them.

26 The fourth proposition would be precisely that category of case into which the Jersey case of *Abdel Rahman v Chase Bank (CI) Trust Company Limited* would fall. The third proposition follows from the requirement of the civil procedure rules that it is no longer sufficient simply to allege facts but the claim form must be supported by a statement of truth.

27 In this case, the Court has been supplied with some voluminous affidavit evidence, which it is contended by the plaintiff can be taken, as a minimum, as equivalent to a statement of truth under the English Civil Procedure Rules. In principle, we are prepared to adopt that approach subject to this qualification; where a declaration is sought that a defendant has acted fraudulently, the evidence which is advanced on affidavit, and which is untested, must reach a high standard because it must satisfy the Court, on the balance of probability not just that a defendant followed a particular course of conduct, but also that he had a fraudulent purpose in so doing. That would require that any other purpose could, on the balance of probability, be issued by that evidence.

28 Before turning to the facts of the case as set down in the affidavits, it is appropriate to mention one other matter. The plaintiff claims that Capita, a Jersey company licensed to undertake trust company and fund services business in the Island, is or was trustee of two Jersey law trusts known as the JS Michault Declaration of Trust and the JS Michault No. 2 Settlement having become trustee on 16 th February, 2001. The plaintiff asserts that one or other of those trusts owns Sidem International Limited, the first defendant. Notwithstanding that ownership, it is asserted that the second defendant controlled and was the driving force behind the first defendant.

29 By Order of Justice dated 15 th October, 2009, the plaintiff has brought proceedings against Capita Trustees Limited, the basis of which appears to turn upon the same facts as those upon which the plaintiff relies for the Pauline action which has been instituted against the second defendant. This Order of Justice asserts that the first defendant is insolvent although there is an uncertainty as to the precise moment when that insolvency arose. The plaintiff claims against Capita Trustees Limited for all necessary and proper accounts to be taken, for payments made by the first defendant to or for the benefit of the second trust after 1 st April, 1996, to be rescinded, that a constructive trust arises over any assets in the hands of Capita which are derived from the payments which are to be set aside, and that the defendant transfer to the plaintiff those assets over which a constructive trust has been imposed. There are also claims for equitable compensation, costs, interest and such other relief as the Court thinks fit. In the Order of Justice, the plaintiff asserts an intention to apply

to join the Capita proceedings with the present proceedings against the first and second defendants.

30 Advocate Wakeham accepted in his submissions before us on 4 th March that if the declarations are made which he seeks, he would intend to use those declarations in the proceedings against Capita. In that connection, it appears to us that two possible conclusions could be drawn:-

> (i) This then is not a case similar to *Pattern v Burke Publishing Co Limited*, where, although the declaration sought was a declaration of legal right, it could not affect the rights of anyone other than of the defendant's or persons claiming through them. As was said by Millett J in that case, the fact that the declaration there could not affect anyone else much weakens the force of the objection to the making of the declaration. By contrast, the making of the declarations here is capable of significantly affecting the rights of persons other than the parties to these proceedings.
>
> (ii) Adopting therefore the comments of Birt, DB, *In the Matter of the Curatorship of X*, the Court needs to consider the practical consequences of the declaration which it is asked to make. In this case the declarations which are sought would have the effect that in the Capita proceedings, a number of issues of fact would no longer need to be established for the purposes of the plaintiff's claim against Capita, and would have been so established notwithstanding that Capita has had no right to be heard in relation thereto in these proceedings today.

31 These are formidable objections which the plaintiff needs to overcome in order to persuade us to grant the declarations in question and we have examined the evidence against that background. We have noted in particular that the amended Order of Justice removes the trustee of the JS Michault Declaration of Trust and the JS Michault No. 2 Settlement as a defendant, and that Prayer 1(c) in the amended Order of Justice appears to reflect the same payments as the plaintiff asserts should be rescinded in paragraphs 71 to 74 of the Order of Justice in the Capita proceedings.

32 There is one further matter which we mention in connection with the declarations sought. On 17 th March, Advocate Tracey accepted that the language of the Prayer which sought a declaration that the transfers were undertaken “in a fraud against the creditors of Sidem” went wider than the Pauline action, and that those could be removed. He also indicated that the allegation of “alter ego” goes wider than the Pauline action. His response to that however was that such a declaration ought to be made because that is what would give the plaintiff the fullest justice.

The Evidence

33 Our attention was drawn first of all to the affidavit of Patrick Michault, the second defendant.

This was put before us in a form which is at best surprising. The affidavit consisted when first drafted of 11 pages of typescript. The attestation provision on page 11 has not been signed. However part of paragraph 28, and paragraphs 29 and 30 have been retyped with a different font, and that single page has been apparently signed by Mr Michault and sworn before a Notary Public in Switzerland. It is dated 9 th April. It is impossible to tell from the single page which has been put before us whether the document to which Mr Michault attached his signature on oath is the same document as that which has been put before us by the plaintiff. We were informed that this is standard practice where a deponent is outside the Island. If that is so, it is a practice much to be deprecated, because it is simply not possible to tell whether the draft affidavit is the same as the affidavit which has in fact been completed by the deponent. The practice has a consequential effect on the value of the evidence, although that does not arise here.

34 There are a number of points from the affidavit, assuming it to represent the deponent's views which are relevant:-

(i) There is an assertion that the first defendant ceased trading in 1995 and has not carried out any activities or business since.

(ii) There is an assertion that the plaintiff was not a creditor of the first defendant at the date of the actual and alleged transfers of money which are the subject of the plaintiff's claims.

(iii) There is an assertion that the first defendant was not insolvent at the date of the alleged transfers and indeed that the second defendant was not the recipient of many of the payments that the plaintiff is seeking to have revoked. Indeed the second defendant indicates a number of defences to the Pauline action which the plaintiff was bringing.

(iv) The second defendant averred that he was not only not a party to the litigation in the first action and therefore not a judgment debtor and had no liability to the plaintiff but furthermore that before 4 th June, 1999, he had not been a Director of the first defendant although he had an involvement with the first defendant by reason of his salaried role as a senior manager of its business affairs.

(v) Between 1995 and 2003 the second defendant was suffering from clinical depression and spent most of his time during that period in clinics. The second defendant asserted on affidavit that he had only a very vague recollection of the transactions and was unable to recall the exact details. He asserted that the plaintiff's delay in prosecuting the claim had not helped him, as the longer that delay went on, the more difficult it became for him to piece everything together.

(vi) He asserted that transfers of funds made for his personal benefit comprised payments in relation to school fees for his children, payments made to other family members and payments made to him representing his salary. These were asserted to be part of an overall remuneration package to which he was entitled.

35 All these matters would go to suggest that the second defendant has and had a bona-fide defence to any allegations of deliberate fraud. These would therefore be factors which the Court would be entitled to take into account in determining whether to exercise its discretion to make the declarations which the plaintiff has sought.

36 Before leaving this affidavit it is also noteworthy at paragraph 28 that the second defendant says this:-

> *"I would of course respect any judgment of the Royal Court but I have recently been advised by my Swiss lawyers that, as Jersey is not a party to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters dated 16th September, 1988, the Swiss Courts will not recognise or accept a judgment from the Royal Court of Jersey in the event that the plaintiff is successful and that the plaintiff would have to commence proceedings again in Switzerland for the purposes of enforcement.* This would mean that this matter would continue to hang over me for a number of years to come."

37 The plaintiff relied on that paragraph to submit that this showed that the second defendant will not in fact pay any attention whatsoever to the proceedings in Jersey, and this was his reason for withdrawing instructions to his former lawyers. It was suggested or implied that this was a matter of bad faith on the second defendant's part. We have to say that we do not view this paragraph in that way. The second defendant is entitled to take any jurisdictional point in Switzerland as is properly to be taken and as far as we are aware he is correct in his statement that Jersey is not party, through the United Kingdom, to the Lugano Convention.

38 In his supplementary affidavit, apparently sworn on 15 th October, 2009, – this affidavit is subject to the same criticisms as to form as the first affidavit – the second defendant gives more detail as to the diagnosis of clinical depression, and furthermore indicates that his lifestyle coupled with the prescription drugs and anti-depressants created a lethal combination which seriously affected his memory and curtailed his mental faculties. On occasions, he said that his memory was so impaired that he could not even remember his own name or anything he had said. He exhibited letters from his doctors to the effect that his memory and concentration had been severely impaired and concluding indeed that his memory was not reliable.

39 The plaintiff relied upon what was asserted to be a continuous change of position by the second defendant which, he said was incredible and this went to the strength of the plaintiff's case and also to the justice of granting a declaration. In relation to the allegation that the plaintiff was guilty of delay, it was said that the plaintiff had in fact been energetic in the litigation at all times except during 2007 and 2008. The plaintiff placed considerable emphasis on the affidavits of Mr Ian Moodie, on his own affidavits and on the affidavit of Mr Steven Milsom.

40 Mr Moodie was at all material times the Executive Chairman of Pinnacle Trustees Limited, a Director of Sidem from 1993 to 1999 and he stated involved in the day to day running of Sidem. He asserted in his affidavit that he dealt with the second defendant as to the on-going management of the first defendant on a regular basis. His affidavit was sworn in support of the plaintiff's position. He had also been involved in the business affairs of the second defendant and those of the second defendant's father through his directorship at Pinnacle Trustees Limited. Mr Milson was at all material times a chartered accountant. He deposed as to his analysis of figures complied by other accountants in relation to the Royal Court of 27 th February, 2003, where it was directed that an account be taken of the contracts described in that order in accordance with the judgment of the Court of Appeal of 18 th July, 2002. This affidavit was sworn in March 2005 and concludes with the reasons why he was unable to provide an agreed joint statement with Messrs Deloitte, the other accountants, for the Court.

41 We have read this evidence carefully and we hope that we do not do an injustice to the plaintiff's case by not reciting it at great length. The evidence undoubtedly supports an assertion by the plaintiff that he had been a creditor of the first defendant by 1996, following which the sum of the transfers in question were allegedly made. The evidence does not necessarily establish however that the second defendant was the alter-ego for the first defendant, nor does it inexorably establish that the second defendant was on the balance of probabilities guilty of committing a fraud. We remind ourselves that the evidence is untested by cross examination.

42 In the circumstances, in the exercise of its discretion and having regard to the legal principles which are set out above, the Court does not consider that it would be appropriate in the interests of justice to make the declarations sought by the plaintiff, especially so given that they would be declarations made in default of appearance by the second defendant and extending to allegations of fraud.