Bates v Combrinck

Jurisdiction:	Jersey
Judge:	F.C. Hamon, O.B.E., Jurats J.L. Le Breton, Georgelin
Judgment Date:	06 July 2004
Neutral Citation:	[2004] JRC 116
Reported In:	[2004] JRC 116
Court:	Royal Court
Date:	06 July 2004

Text

[2004] JRC 116

ROYAL COURT

(Samedi Division)

Before:

F.C. Hamon, **Esq.**, O.B.E., **Commissioner, and** Jurats J.L. Le Breton **and** Georgelin

Between
David Leslie Bates (suing on behalf of himself and all other shareholders in the Sixth Defendant other than the Second, Fourth and Fifth Defendants)
Plaintiff
and
(1) Thomas Charles Combrinck (also known as Thomas Brudenell-Bruce)
(2) David John Risbey
(3) Vijay Khakhria
(4) Queen Street Nominees Limited
(5) Guardian Trust Company Limited

(6) Microstar Limited
Defendants

Advocate J. A. Clyde-Smith **for the first Plaintiff.**

Advocate A. D. Robinson **for the Plaintiff;**

Advocate R. J. Michel **for the Second Defendant.**

Authorities

Service of Process (Jersey) Rules 1994: Rules 7(a), 7(c) and 7(s).

Dicey and Morris' The Conflict of Laws (13th Ed'n): 11–123.

James Capel (Channel Islands) Limited v. Koppel and Fenchurch Trust Limited [1989] JLR 51 at 62.

Re Hinchliffe (1895) 1 Ch 117.

Virani v Virani [2000] JLR 203 at 213

Re A Company (No 007281 of 1986) (1987) BCLC 593 at 599.

Koonmen v Bender [2002] JLR 407.

Crossmore Electrical and Civil Engineering Ltd. (1989) BCLC 137.

Companies (Jersey) Law 1991: Articles 74 and 141.

Mettall and Rohstaff A.G. v. Donaldson Lufkin & Kenrette Inc. and another (1989) 3 All ER 14 at 24.

Clark v Cutland (2004) 1 WLR 793.

Companies Act 1985: ss. 459 and 461.

Re Bird Precision Bellows Ltd. (1986) Ch 658.

Wright v. Rockway (1994) JLR 60.

Seaconsar Far East Ltd. V. Bank Markezi Jomhouri Islami Iran (1994) 1 AC 438.

Application to set aside Order for service out of the jurisdiction.

THE COMMISSIONER:

1 David Risbey is one of six defendants named in an Order of Justice dated 8 th may 2003. The plaintiff is David Leslie Bates who brought the proceedings on 8 th May “Suing on behalf of himself and all other shareholders in the sixth defendant (a Jersey company called Microstar Limited) “all other shareholders in Microstar Limited other than the second (Mr. Risbey) and the fourth (Queen Street Nominees Limited) and the fifth defendant (Guardian Trust Company Limited)”. Essentially Mr. Bates made a very serious allegation in his Order of Justice that substantial assets in Microstar Limited were dissipated improperly and in breach of the directors' fiduciary and statutory duty. The sum claimed to have been so dissipated is said to be nearly nine million pounds (£9M).

2 Mr. Risbey lives in Zurich, Switzerland and it was of course necessary to obtain leave to serve him out of the jurisdiction. On 8 th May 2003, Advocate Taylor of Bedell Cristin swore an affidavit in support of his application to serve both the first and second defendants out of the jurisdiction and leave was given on 13 th May 2003. The application was made under Rules 7(a), 7(c) and 7(s) of the Service of Process (Jersey) Rules 1994. The second defendant alleges that leave should not have been granted under any of these rules or at all.

3 It is necessary to set out relevant paragraphs of the Rule. Rule 7 says–

> ***“Service out of the jurisdiction of a summons may be allowed by the Court whenever:***
>
> ***(a) relief is sought against a person domiciled within the jurisdiction …***
>
> ***(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto and***
>
> ***(s) the claim or application is brought under the terms of the Companies (Jersey) Law 1991 and the person to be served is a necessary or proper party thereto”.***

4 Mr. Michel asked us to consider a well-known passage from Dicey and Morris' The Conflict of Laws (13th edition) where at 11–123 the authors say:

> ***“Four cardinal points have been emphasized in the decided cases.*** First, the court ought to be exceedingly careful before it allows process to be served on a foreigner out of England. This has frequently been said to be because service out of the jurisdiction is an interference with the sovereignty of other countries, although all countries exercise a degree of jurisdiction over persons abroad. Secondly, if there is any doubt in the construction of any of the heads of Order 11 r1(1) (the same as our Rule 7) that doubt ought to be resolved in favour of the defendant. Thirdly, since the application for permission is made without notice to the defendant, a full and fair disclosure of ***all relevant facts ought to be made.*** Fourthly the court will refuse permission if the case is within the letter

but outside the spirit of the law".

5 Much the same was said in *James Capel (Channel Islands) Limited v. Koppel and Fenchurch Trust Limited* (1989) JLR 51 at 62 where the Court said–

> ***"In the view of this court, the Greffier obeyed the substance of the Rules and we are not willing to interfere with the grant of leave to serve out of the jurisdiction on procedural grounds.*** Having said that, we do think that, in future, it would be preferable if the Greffier were to insist upon a full affidavit as described in para. 11/4/3 of the White Book (op. cit., at 89) and we so recommend. We have reason to believe that he has put the recommendation into practice already.
>
> ***Therefore, the court must go on to consider the substance of this matter and whether we should interfere with the discretion of the Greffier.*** We accept that if — "there is any doubt, that doubt ought to be resolved in favour of the foreigner" and that — "this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction" (per Farwell, LJ in The Hagen (1908) P. at 201).
>
> ***Many of the authorities were canvassed before us in detail, but, rather than review a number of cases at length, we feel able to rely on the White Book which succinctly sets out the principles involved.*** We refer to (The Supreme Court Practice 1988, para. 11/1/6. at 82–83): "1. The applicant for leave must show that his case falls clearly within one or other of the sub-paragraphs of r.1(1) or (2)."
>
> ***We interpose here to say that the applicant for leave must show that his case falls clearly within one or other of the sub-paragraphs of r.7.*** The plaintiff relies on r.7(e)(i) and (iii) and 7(g). Paragraph 11/1/6 continues (op. cit., at 82):
>
> ***"In the application of this principle:***
>
> > ***(a) The applicant may choose which sub-paragraph of r.1(1) to rely on; the sub-paragraphs are, generally speaking, to be read disjunctively*** (*Matthews v. Kuwait Bechtel Corp.* [1959] 2 Q.B. 57) ***…"***
> >
> > ***The plaintiff has chosen r.7(e)(i) and (iii) and r.7(g).*** Rule 7(g) relates to injunctions and is not itself sufficient to found jurisdiction. We shall deal with this aspect of the matter later. We return to para. 11/1/6:
> >
> > ***((b) the case must fall within the spirit as well as the letter of the Order*** (*Johnson v. Taylor Bros. & Co.* [1920] A.C. 144, ***p. 153);***
> >
> > ***(c) any ambiguity in the construction of the rules will be resolved in favour of the foreigner (The Hagen [1908] P. 189, p. 201);***

> ***(d) the court must decide upon the application itself whether the case falls within O.11; it can grant leave on terms, or as to part of the claim only, but cannot leave the question of whether the case falls within the Order to be determined at the trial*** (*Vitkovice Horni v. Korner* ***…).***
>
> ***The degree of proof of compliance with these requirements is, generally speaking, that of a 'good arguable case'".***

6 On 18 th July 2003, this court ordered judgment against Mr. Combrinck (the first defendant) in the sum of £8,972,347.97 (less $3,872.77) with interest and costs. Mr. Combrinck did not appear (Mr. Risbey had not yet been served). The Court in its judgment cited the whole of the Order of Justice which clearly and in some detail sets out the successful proceedings in the High Court of England and Wales and in the Appeal Court and the orders which were made in favour of Mr. Bates and Microstar Ltd. The action in the High Court was tried on its merits and the judgment was upheld on appeal. It was clearly necessary to have the action brought to Jersey for Microstar Ltd. Is a Jersey Company. Both Queen Street Nominees Limited and Guardian Trust Company Limited were served in Jersey on 12 th May 2003. The third defendant (against whom proceedings have been discontinued) was served on 15 th May. Unbeknown to Advocate Taylor Microstar Limited had been dissolved by Financial Services on 11 th October 2002. Although not relevant to our decision the company has eventually been reinstated (on 3 rd October 2003) and is now a party to the proceedings.

7 There is an attack on the affidavit supplied by Advocate Taylor. Mr. Michel argues that it shows no arguable case. We do not agree. Advocate Taylor says in his affidavit: "For the reasons set out in the Order of Justice I believe that the plaintiff has a strong case and that there is a good cause of action". The Order of Justice is attached to the affidavit.

8 In *Re Hinchliffe* (1895) 1 Ch 117 the court said at page 120–

> ***"When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit.*** It is only made an exhibit to save expense. Therefore any person who is entitled to see the affidavit is equally entitled to see the documents referred to therein".

9 The affidavit specifically refers to each defendant. It refers to actions in Jersey and in England and specifically refers to paragraphs 12 to 20 of the Order of Justice.

10 It would be difficult on a reading of the Order of Justice, incorporated as it is in the affidavit, for the Greffier to have reached any other conclusion than that the case was "a proper one for service out of the jurisdiction".

We cannot envisage that the rule requires an affidavit to detail evidence to such a copious

degree when the Order of Justice is attached and integrated into the affidavit. As was said by Birt, D.B. in *Virani v Virani* [2000] JLR 203 at 213–

> ***"It is primarily for the judge considering the application to serve out of the jurisdiction to consider whether the affidavit is in sufficient form and whether it gives him sufficient information to make a decision.*** The success of an application to set aside on grounds of failure to comply with the requirements of Rule 9 will depend on the facts of each case, including any prejudice to the defendant, the extent and effect of any non-disclosure by the plaintiff and whether the court is satisfied that, notwithstanding the failure, there are clearly valid grounds for leave to serve out".

11 We have no doubt that Mr. Bates has established that there is a serious issue to be tried. This does not mean that Mr. Risbey does not have an answer to the allegations made against him. It is not for this Court to ascertain what his defence might be. For all we know, it might be cast iron. What is, however, surprising to us is that although the second defendant swore an affidavit in support of this application to set the Order aside in that affidavit he makes no denial of any alleged wrongdoing. His application is purely a technical one based on an interpretation of the rules. We would not, of course, expect any detail. That would only come if he were to be made a party with a right to file an answer — but there is nothing whatsoever in his affidavit to imply that he is a person wronged or mistakenly accused.

12 Advocate Michel correctly argued that no defendant had been served before the application for leave to serve outside the jurisdiction was made. The facts are clear.

13 At the relevant time–

We should, in passing, say that we see nothing in that point at all. Mr. Khakhria was served personally at an address in Jersey; he was a defendant; he did not contest service and the fact that Mr. Bates was prepared by letter dated 10 th June 2003 to discontinue the action against him is no evidence at all that up to that date he was not a genuine party to the proceeding.

(1) Microstar Limited had been dissolved on the 11th October and was not in being.

(2) Mr. Khakhria was not alleged to be domiciled in the Island of Jersey.

14 Mr. Risbey in his affidavit says (at paragraph 5) "I do not deny that at the relevant time Mr. Khakhria was (probably)" — his brackets — "resident in Jersey but not at the address stated by Advocate Taylor in his affidavit. Nowhere in Advocate Taylor's affidavit is it deposed that Mr. Khakhria is domiciled within the jurisdiction".

15 On any reading of the Order of Justice the claim against Mr. Khakhria was a substantial

one. He was a director along with the other two named defendants and there is not a shred of evidence that he was not a genuine party to these proceedings up to the time of discontinuance. The reasons for the *volte-face* have been explained to us; they are not relevant to our decision and nowhere has Mr. Risbey given any reason as to why Mr. Khakhria was not initially a genuine party to the proceeding nor any reason as to why he should not have had a domicile of choice in Jersey at the time that he was served.

16 Mr. Michel in his skeleton argument refers somewhat disparagingly to the two other *"defendants"* (that is the company defendants based in Jersey).

17 We agree — we cannot do otherwise — that when Advocate Taylor swore his affidavit on 8 th May 2003 no party had yet been served. When the Act of Court issued for service on the 13 th May Queen Street Nominees Limited and Guardian Trust Company limited had been served the day previously. Microstar Limited would no doubt also have been served at that time but, as we have said, unbeknown to Advocate Taylor, it has been dissolved and was not yet reinstated.

18 It is argued (and stressed by Mr. Risbey in his affidavit) that *"no relief is sought against the two local companies"*. On a reading of the Order of Justice it is clear that the claim is both derivative and made on the basis of unfair prejudice. The derivative claim is a claim for damages and is not advanced against the two local companies.

19 In the case of unfair prejudice it is accepted practice that every member of the company other than the plaintiff should be joined as a defendant whether or not allegations of unfair prejudicial conduct are made against him. As Vinelott J has said in *Re A Company* (No 007281 of 1986) (1987) BCLC 593 at 599, in the case of a small private company (as this is), every member should be joined as a party to the proceeding. The two company defendants may well be affected by the relief sought. By way of example, without prejudice to any of its general powers under Article 143(1), under Article 143(2)(d) the Court could make an order that the other shareholders purchase Mr.Bates' shares. The Court has a wide discretion under Article 143(2) and, in our view, the fifth prayer of the Order of Justice, where the plaintiff seeks "such further or other relief as the Court considers just or appropriate" is more than a term of art in the circumstances of the case.

20 We have to record that leave to serve out of the jurisdiction was renewed at 9 th September 2003, 24 th October 2003 and 14 th January 2004. Again, each of these processes is criticized by Mr. Michel.

21 The fact that the proceedings against Mr. Khakhria had been discontinued is not referred to in his renewals by Advocate Taylor. We have found as a matter of fact that the inclusion of that defendant was not an abuse of process. As was said in *Koonmen v Bender* [2002] JLR 407 at 415–

> ***"We have examined carefully the affidavit sworn by Mr. Wheeler.*** It is true that it does not include reference to the correspondence and other documents that have been relied upon in relation to the arguments as to whether there is a serious issue. But this is a sin (if it be one) of omission rather than commission. Counsel for STAL did not submit that there has been any deliberate intent to deceive the Greffier Substitute on the part of Mr. Wheeler and indeed, there is no evidence of any such intention. As in the case of Ellinger (2), we think it could be said that the affidavit errs slightly on the side of brevity. But counsel did not suggest that any prejudice had been caused to STAL or AIA Anguilla by reason of that brevity. STAL was, for obvious reasons, fully aware of the correspondence between it and the legal advisers of Mr. Koonmen, and of the meeting that had taken place.
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> ***Counsel for Mr. Koonmen also drew attention to the recent case of*** *Virani v. Virani (8)*, ***where Birt, D.B. stated*** (2000 JLR at 213):
>
> ***"The fact that an affidavit in support of an application for leave to serve out of the jurisdiction is defective (in that it does not comply with r.9) does not of itself necessarily invalidate any order for leave to serve out.*** It is primarily for the judge considering the application to serve out of the jurisdiction to consider whether the affidavit is in sufficient form and whether it gives him sufficient information to make a decision. The success of an application to set aside leave on grounds of failure to comply with the requirements or r.9 will depend upon the facts of the case, including any prejudice to the defendant, the extent and effect of any non-disclosure by the plaintiff and whether the court is satisfied that, notwithstanding the failure, there are clearly valid grounds for leave to serve out".
>
> ***Counsel for STAL submitted that these remarks were obiter.*** That may be right but they appear to us nonetheless to be very much in point here. In our judgment, the non-disclosure caused no prejudice to the defendants and the documentation in question would not, if disclosed to the Greffier Substitute, have affected his decision to order service out."

22 This omission would in our judgment not have affected the learned Master's decision had it been disclosed.

23 As to the fact that Microstar had been dissolved when the first application was made, in our view Advocate Taylor's second affidavit (which deals with Mr. Risbey's affidavit then received) and which particularizes the problems in serving on a person outwith the Bailiwick is both detailed and explicit. We cannot see any prejudice suffered by the second defendant in that regard. In any event, unfair prejudice proceedings are, in substance, a resolution of dispute between shareholders to which the Jersey Company is only a nominal party. (See *Crossmore Electrical and Civil Engineering Ltd.* (1989) BCLC 137.)

24 The application is also made under Rule 7(s) and there are two claims under the

Companies (Jersey) Law 1991 — under Articles 74 and 141.

25 Mr. Michel relied heavily on the case of *Mettall and Rohstaff A.G. v. Donaldson Lufkin & Kenrette Inc. and another* (1989) 3 All ER 14 at 24 where Slade LJ said–

> ***"11, r 1 falls within the ambit of this rule, Ord.*** 11 r 4 lays down special rules as to the evidence which must support it. Rule 4(1) provides:
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> > ***'An application for the grant of leave under rule 1(1) must be supported by an affidavit stating — (a) the grounds on which the application is made, (b) that in the deponent's belief the plaintiff has a good cause of action …'***
>
> ***We have quoted r 4(2) above.***
>
> ***The notes in The Supreme Court Practice 1988 Vol 1, para 11/4/3 rightly stress the importance of the affidavit by drawing attention to the following points:***
>
> ***9a) The affidavit should be sufficiently full to show that the plaintiff has a good arguable case for the relief claimed.*** Drafts of the writ and statement of claim should be exhibited in all but the simplest cases. Copies of the documents pleaded should be exhibited. (b) The affidavit must make clear which sub-rule of r. 1(1) is relied on."
>
> ***"One of counsel's responses to this contention has been to refer us to the general observations made by Lord Denning MR in Re Vandervell's Trusts (No. 2) [1974] 3 All ER 205 at 213, [1974] Ch 269 at 321 as to the modern practice concerning pleadings:***
>
> > ***"It is sufficient for the pleader to state the material facts.*** He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated'.
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> ***We respectfully agree with this statement as a general proposition.*** However, it was not made in the context of a pleading intended to be served out of the jurisdiction, to which we think rather different considerations apply. In our judgment, if the draftsman of a pleading intended to be served out of the jurisdiction under Ord 11, 4 4(1)(f) (or indeed under any other sub-paragraph) can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter, for the purpose of justifying his application under Ord 11, r r(1)(f), be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps, the alternative basis has been specifically referred to in his affidavit evidence, which it was not in the present case). With this possible exception, if he specifically states in his pleading the legal result of what he has pleaded, he is in our judgment limited to what he has pleaded, for the purpose of an Ord 11 application. To permit him to take a different course would be to encourage

circumvention of Ord 11 procedure, which is designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which ***it is invited to deal on the ex parte application and the defendant is likewise apprised as to the nature of the claim which he has to meet, if and when he seeks to discharge an order for service out of the jurisdiction".***

26 It cannot be deemed that the particular articles relied on are not stated in the Order of Justice. In his first affidavit Advocate Taylor says–

> *"The claim is also" (our underlining) "brought under Rule 7(s) as the claim falls under the provisions of the Companies (Jersey) Law 1991.* The claim is a derivative action and an unfair prejudice claim brought by a shareholder in Microstar and the Directors and majority shareholders are necessary and proper parties to such an action".

27 The Order of Justice sets out the duties of directors and in paragraph 40 it pleads the statutory breach:

> *"By reason of the aforesaid breaches of duty on the part of Mr. Combrinck, Mr. Risbey and Mr. Khakhria and each of them, the company has suffered loss and damage".*

28 In *Clark v Cutland* (2004) 1 WLR 793 the Court of Appeal held that a proprietary claim lay against pension fund trustees. The Court stated that the petitioner could obtain the same relief for the benefit of the company under s.461 (which has the same import as article 143) as he could have obtained for it by a derivative claim. The Court said at 793–

> ***"Accordingly in my judgment the company is entitled to trace the payments of pension fund contributions which Mr. Cutland made without authority into the pension fund assets.*** Mr. Clarke, on behalf of the company, has elected to pursue a proprietary remedy by seeking a charge over the pension fund assets. In my judgment this is an appropriate form of remedy …"

29 Because Articles 141 and 143 are similarly phrased to the provisions of SS. 459 and 461 of the Companies Act 1985, we can have recourse to English judgments in that regard.

30 In *Re Bird Precision Bellows Ltd.* (1986) Ch 658 it was said by Oliver LJ at 669 that the effect of the wording–

> ***"…. Is to confer on the Court a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company …".***

31 The Order of Justice does not refer to specific articles of the law but it is quite clear, in our judgment, that there is a common law and a statutory claim. Paragraph 24 of the Order of Justice sets out–

> *"Further, as directors of the company, at all material times, each of Mr. Combrinck, Mr. Risbey and Mr. Khakhria owed the following statutory duties pursuant to Article 74 of the Companies (Jersey) Law 1991".*

(They are then set out). All that Rule 7(s) states is that " *the claim …… is brought under the terms of the Companies (Jersey) Law 1991"*.

The word *"further"* only lends support to the conclusion that it is an additional claim which is borne out by paragraph 25 of the Order of Justice which states that *"each of Mr. Combrinck, Mr. Risbey and Mr. Khakhria has acted in breach of each of the above-mentioned fiduciary duties and/or statutory duties in the respects set out below".*

As is stated in Halsbury's Laws of England (4th Edition Re-issue) at paragraph 395–

> *"Essentials of the cause of action.* In order to succeed in a claim for damages for breach of statutory duty, the claimant must establish a breach of a statutory duty, the claimant must establish a breach of a statutory obligation, which, on the proper construction of the statute was intended to be a ground of civil liability to a class of persons of which he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection; and he must establish that the breach of statutory obligation caused, or materially contributed to, that injury or damage".

32 As we read paragraph 74 its intention must be and particularly in the circumstances of this case, to give the company a right (or a member of the company derivatively) to enforce the duties imposed by Article 74.

33 That does seem to us a good arguable case that damages may be claimed for a breach of Article 74. Whether that case succeeds or not, is not for us to decide here.

34 In *Wright v. Rockway* (1994) JLR 60 where the learned Court carefully analysed many of the cases before us today, Crill, Bailiff cited with approval the case of *Seaconsar Far East Ltd. v. Bank Markezi Jomhouri Islami Iran* (1994) 1 AC 438. This case is, following Mr. Robinson's argued case, authority that–

> (i) In considering whether the jurisdiction of the Court has been sufficiently established for it to consider the question out, the standard of proof is that of a good arguable case and further
>
> (ii) In respect of the merits of the claim under the various applicable rules, it is sufficient for the plaintiff to establish a serious issue to be tried.

35 In our judgment the affidavit when read with the Order of Justice leaves no doubt that there is a good arguable case and that there is a serious issue to be tried.

36 When the matter comes to trial, the Court has a very wide discretion to do what it considers fair and equitable under Article 141. As we have said Mr. Risbey may be entirely without fault in the matter. That is for the court of trial. For all these reasons we decline to set aside service of the proceedings and accordingly we refuse to discharge the orders giving leave to serve proceedings on the second defendant out of the jurisdiction. We declare that the proceedings have been properly served and that the Court has jurisdiction over the second defendant.