Guenier v Fuller

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Judge:	Bailiff
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Text

[2005] JRC 50

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq., Deputy** Bailiff, **and** Jurats Georgelin **and** Le Cornu.

In the matter of Northwind Yachts Limited

Between
Nigel Wyatt Guenier
Representor
and
Gerald Roger Fuller
Respondent

Advocate A. Clarke **for the representor**

Advocate M. Renouf **for the respondent**

Authorities

Barrett v Duckett [1995] 1 BCLC 243.

Gwemde Valley Development Co Ltd and Anor v Koshy & Ors (No 3) [2004] 1 BCLC 131.

Ferguson v Wallbridge (1935) 3 DLR 66.

Fargo Ltd v Godfroy (1986) 1 WLR 1134.

Limitation Act 1980.

Re Esteem Settlement (2002) JLR 53,

Bailiff DEPUTY

1 This is an application by the representor ("Mr. Guenier") for an order under Article 143 of the Companies (Jersey) Law 1991 ("the Companies Law") that he be authorized to bring civil proceedings against the respondent ("Mr. Fuller") on behalf of a Jersey company called Northwind Yachts Limited ("the Company").

2 The relevant Articles of the Companies Law are as follows:–

"Part XX

Unfair prejudice

Article 141

Power for member to apply to court

(1) A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) ……

………………………………………………

Article 143

Powers of court

(1) If the court is satisfied that an application under Article …. 141….. is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of paragraph (1), the court's order may:–

……….

(c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct……..”.

The factual background

3 The Company is beneficially owned equally by Mr. Guenier and Mr. Fuller. They are the only two directors. It was incorporated as a joint venture between them to act as distributor in the United Kingdom for luxury yachts built by a Spanish company originally known as Northwind Industries SA (“the Spanish company”). Mr. Guenier was able to bring the agency to the joint venture whereas Mr. Fuller, through one or more wholly owned companies, was the owner of Deacons Boatyard Limited (“Deacons”) which ran a boatyard and marina in Southampton and could therefore provide a UK presence for the agency, as well as assistance in after sales etc.

4 The venture was not a success. It originally started in 1990, but ceased when the Spanish company ran into difficulties. The Spanish company re-started in 1995 and the agency ran until October 1999 when it was terminated by the Spanish company.

5 Mr. Guenier alleges that Mr. Fuller committed a number of breaches of his fiduciary duty as a director of the Company. In particular, he alleges that Mr. Fuller carried out various acts which benefited his company Deacons at the expense of the Company. It is not necessary to recite these in detail. Mr. Guenier has prepared a draft Order of Justice which would be issued if the Court were to grant his application. We would summarize our understanding of the various heads of claim as follows:–

This does not purport to be a full description of the claims and is merely intended to give a general description.

(i) Wrongly and without consulting Mr. Guenier, Mr. Fuller waived £16,100 of the purchase price of a yacht sold by the Company. He did this in order to benefit Deacons so as to settle a dispute which had arisen between Deacons and the customer concerning certain works carried out by Deacons under warranty.

(ii) Mr. Fuller failed to assist in the recovery by the Company of approximately £4,800 paid to Deacons in respect of services which were never properly carried out.

(iii) Because of Mr. Fuller's actions the sum of £14,927 was ultimately paid out of an escrow account to Deacons in circumstances where it should have been paid to the Company.

(iv) Similarly, £10,072 was wrongly paid out of the escrow account to the Spanish company as a result of Mr. Fuller's actions.

(v) Mr. Fuller wrongly permitted Deacons to purport to sell a Northwind 50 in 1997 when the vendor should have been the Company. Deacons received the sale proceeds and did not account to the Company for the sum of £44,210 paid by the Company to the Spanish company in respect of the yacht nor in respect of the agency profit of £22,600 which should have been earned on the sale by the Company. Mr. Fuller had refused to assist in these recoveries.

(vi) In May 1998 the Company had paid a sum in pesetas (equivalent to £30,049) in respect of a yacht which the Company, at the request of Mr. Guenier, had not agreed to deal with.

(vii) Because of Mr. Fuller's various breaches of his fiduciary duty as a director, the Company had incurred overdraft charges, which it would not otherwise have incurred, in the sum of £11,300.

(viii) Finally, the actions of Mr. Fuller had caused the loss of the agency. There was therefore a claim for loss of profits which would have been earned had the agency continued.

6 The claims are denied by Mr. Fuller. On the contrary, he says that he and Deacons have made considerable losses as a result of the joint venture. He blames Mr. Guenier for having rejected the advice of English solicitors as to the terms of the agency contract with the Spanish company and having caused the Company to enter into a contract which was poorly drafted and gave the Company little remedy against the Spanish company in respect of defective yachts. He also alleges that Mr. Guenier has only resuscitated these allegations (which were first made many years ago) because, in 2003, Mr. Fuller brought a successful action against Mr. Guenier for 50% of a guarantee which one of Mr. Fuller's companies had given in respect of the Company's bank overdraft.

7 The Company has been dormant for many years. We have not been shown any accounts but we are informed that the Company has no assets other than any claim which it may have against either of its directors. It also apparently has no outside creditors but does owe money to the directors and/or their associated companies.

8 It is clear that the Company is deadlocked. It cannot take any action without the agreement of both Mr. Guenier and Mr. Fuller. Mr. Fuller will not agree to the Company instituting

proceedings against him and Mr. Guenier has rejected the suggestion that the Company should be wound up.

The submissions

9 Advocate Clarke, on behalf of Mr. Guenier, submits that this is a clear case where the Company cannot act to recover its claim against Mr. Fuller because, as a director and shareholder, he is able to block such action. The provisions of Article 141 are therefore satisfied and the correct course of action is to allow Mr. Guenier to bring a derivative action in the Company's name under Article 143(2)(c).

10 Advocate Renouf, on behalf of Mr. Fuller, opposes the application on a number of grounds.

(i) An alternative remedy.

11 His first submission is that the Court should not allow a derivative action to be brought if there is an adequate alternative remedy. He referred us to *Barrett v Duckett* (1995) 1 BCLC 243, a decision of the English Court of Appeal. Rather unhelpfully, the copy of the judgment produced to us appears to have been printed off a website and does not contain any page numbers of the original report. We have had occasion to comment on this in the past, and we emphasize to counsel that any version of a reported case produced to the Court must contain the page numbers of the reported decision, as otherwise citations cannot be properly referenced. The Court of Appeal summarized the principles applicable to a representative action on page 6 of the document before us as follows:–

> ***"The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:***
>
> > ***1. The proper plaintiff is prima facie the company.***
> >
> > ***2. Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.***
> >
> > ***3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.***
> >
> > ***4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.***

5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.

6. The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

As the Court of Appeal said in that case, the principles are of course equally applicable where there is deadlock as where there is a majority and minority shareholder position. The Court of Appeal was considering a derivative action brought by a shareholder without the authority of the court but in our judgment the principles are equally applicable where the Court has to decide whether to allow a derivative action to be brought pursuant to the powers conferred on it by the Companies Law.

12 In *Barrett* the Court of Appeal went on to consider whether the fact that the company could be placed in liquidation was an adequate alternative remedy. The Court referred to the Privy Council decision of *Ferguson v Wallbridge* (1935) 3 DLR 66 and to the decision of Walton J in *Fargro Limited v Godfroy* (1986) 1 WLR 1134. In both of those decisions it was held that, once a company goes into liquidation, the vice against which a derivative action is intended to guard has disappeared because the ability to bring an action vests in the liquidator. As Walton J said at 1136:–

"But once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation. Here, what has happened is that the liquidator is now the person in whom that right is vested."

Later, at 1138, he said:–

"So there is clear authority in the Privy Council as to the vast distinction that there is between the position where the company is a going concern and the minority shareholders' action can be brought, and a case when it goes into liquidation where there is no longer any necessity for bringing a minority shareholders' action."

13 The Court of Appeal adopted that approach and went on to hold that the availability of liquidation was an adequate alternative remedy even where the company was not yet in liquidation and where, therefore, the views of the liquidator as to the potential litigation were not known. The Court applied the principle in that case to strike out the action because the alleged defaulting shareholder had offered to place the company in liquidation and the Court held that that was the appropriate way forward.

14 Mr. Renouf argued that liquidation was an adequate alternative remedy here. This was a completely dormant company and there was no prospect of it coming back to life. Mr. Fuller had offered liquidation but it had been rejected by Mr. Guenier. Hence Mr. Fuller had instituted proceedings before this Court applying for a just and equitable winding up. A liquidator would be able to look at the alleged claims against Mr. Fuller objectively and decide whether the Company should pursue them. Equally importantly, a liquidator would be able to consider whether the Company had a claim against Mr. Guenier. Although Mr. Fuller was minded to let sleeping dogs lie if there was no action against him, he believed that the Company did have a claim against Mr. Guenier and accordingly, if a claim were brought against him (Mr. Fuller), he would wish the Company to pursue its claim against Mr. Guenier. Accordingly, if the Court allowed the derivative action to proceed, Mr. Fuller would bring a similar application seeking leave to bring a derivative action against Mr. Guenier. There would then be two derivative actions taking place at the same time. A far better course was for the liquidator, as an independent professional, to consider the strengths of the claims against each director and to act in the best interests of the Company on the basis of independent legal advice.

15 Mr. Clarke submitted that liquidation was not appropriate because it would cause delay and extra cost. The liquidator would need to familiarise himself with the matters in dispute, consider them and take legal advice. This would take time. Equally, costs would be incurred not only by the liquidator himself, but also on the legal advisers consulted by the liquidator. He conceded that it would not be very satisfactory if there were two derivative proceedings taking place at the same time but argued that that did not mean that liquidation was the appropriate route.

16 The Court is in no doubt that liquidation is the right course here and provides an adequate alternative remedy to a derivative action. The Company has no future. It is not a going concern. It may have assets in the form of claims against Mr. Fuller and/or Mr. Guenier, but it has no other assets. The claims, if they exist, belong to the Company and the correct person to take action on behalf of a company which is no longer a going concern is its liquidator. The liquidator will be independent and can therefore take a detached look at the position. It may cause a little delay but we did not see that it need be very great. Presumably Mr. Guenier is in possession of all the documents and information which he says support his claim and he can therefore make this available to the liquidator and explain the background to him. Similarly in terms of cost. The liquidator will incur costs in reviewing the matter himself and taking legal advice, but the bulk of the work has no doubt already been done by Mr. Guenier and his lawyers and can be easily presented to the liquidator. We agree that it would be highly unsatisfactory to have two derivative actions proceeding in opposite directions at the same time; much the better course is for the liquidator, as the proper officer of the Company, to consider whether the Company has claims against either or both the directors and to bring one or more actions accordingly. In the light of our finding that liquidation provides an adequate alternative remedy and applying the principles set out at para 11, we do not consider that a derivative action is appropriate.

17 We are conscious that the Company has no funds. Clearly, it would not be right to proceed by way of liquidation if, by starving the Company of funds, Mr. Fuller were able to stifle the Company's claim against him. In the course of the hearing, he undertook to make funds available on an equal basis with Mr. Guenier sufficient to permit the liquidator to investigate the matter and to consider whether to bring a claim. Clearly if the liquidator does decide to bring a claim against Mr. Fuller, at that stage he will no doubt look to Mr. Guenier for funding in respect of that litigation; and vice versa.

18 However the important thing is to ensure that the liquidator is put in funds to undertake the task of assessing whether the Company has claims against either director. The application to wind up the Company on just and equitable grounds was for some reason not actually before us at the hearing, although it has been lodged for some time. We will hear counsel on the exact method of proceeding but we have it in mind that we should move speedily to make a winding up order on that application. We propose to stay rather than dismiss this present application. It is Mr. Fuller who has argued strongly that there should be a liquidation rather than a representative action brought by Mr. Guenier. Should he fail to put up adequate funding so as to enable the liquidator properly to investigate the matter, the court would no doubt be willing to allow Mr. Guenier to resuscitate this present application with a view to his bringing a derivative action, as liquidation would have been shown not to have been an adequate alternative remedy. Should it be Mr. Guenier who fails to come up with his share, that would be a matter for him. If the liquidator is unable to proceed in his claim against Mr. Fuller because he has received insufficient funds from Mr. Guenier, that will be entirely Mr. Guenier's choice.

19 For these reasons, we decline to make an order under Article 143(2)(c), allowing Mr. Guenier to bring a derivative action at this stage and we order that his representation be stayed pending winding up of the Company.

(ii) Well founded

20 As we have disposed of this matter on the ground that there is an adequate alternative remedy, we do not need to consider the alternative arguments addressed by Mr. Renouf and anything which we say is *obiter*. However we think it right to comment very briefly on his two additional points.

21 Before making an order under Article 143, the Court must be satisfied that the application under Article 141 is “well founded”. In many cases, this will require a full trial of the issues. If, for example, the allegation of unfair prejudice is that the controlling shareholder has procured that the company carry out a particular transaction which is said to be unfair and the relief sought by the minority shareholder is an order that the company should desist from carrying out the transaction, it will be necessary for the Court to have a full trial of the issue in order to ascertain whether the transaction is such as to amount to one which is unfairly prejudicial to the minority shareholder so that it can decide whether to order the

company to refrain from doing or continuing the act in question. However the position is rather different where the relief which is sought is permission for the minority shareholder to bring a derivative action in respect of the acts giving rise to the alleged unfair prejudice. It would be nonsensical for the Court to have a full trial of the issue in order to decide whether claims are well founded and then authorize the minority shareholder to bring a derivative action alleging exactly the same matters so there will have to be a second full trial of the identical issues.

22 Both counsel were agreed that, in such circumstances, the Court need only consider the pleaded allegations and the affidavit evidence filed in support in order to consider whether, on the basis of the pleaded allegations, the action is well founded. It is does not require a trial of the issues.

23 On this basis, we are satisfied that, subject to the prescription point, the action is well founded for these purposes. We would therefore have granted leave to Mr. Guenier had we not considered that liquidation was an adequate remedy.

(iii) Prescription

24 As part of his submission that Mr. Guenier had not satisfied the Court that the action was 'well founded', Mr. Renouf raised an issue on prescription. He argued that, either as a matter of interpretation or by analogy, Article 53 of the Trusts (Jersey) Law 1984 ("the 1984 Law") applied to actions by a company against a director for breach of the director's fiduciary duty. The relevant period, he submitted, was three years from when the Company first had knowledge of the breaches of fiduciary duty and Mr. Guenier had not shown that this was less than three years, given that the events had occurred between 1996 and 1999.

25 Article 53 of the 1984 Law reads as follows:–

> ***"(1) No period of limitation or prescription shall apply to an action brought against a trustee –***
>
> > ***(a) in respect of any fraud to which the trustee was a party or to which he was privy; or***
> >
> > ***(b) to recover from the trustee trust property –***
> >
> > > ***(i) in his possession; or***
> > >
> > > ***(ii) under his control; or***
> > >
> > > ***(iii) previously received by him and converted to his use.***
>
> ***(2) Save as provided in paragraph (1), the period within which an action founded on breach of trust may be brought against a trustee***

by a beneficiary or an enforcer is –

> ***(a) three years from the delivery of the final accounts of the trust to the beneficiary or the enforcer or***
>
> ***(b) three years from the date on which the beneficiary or the enforcer first has knowledge of the occurrence of a breach of trust,***
>
> ***whichever period shall first begin to run.***

(3) Where the beneficiary is a minor the period referred to in paragraph (2) shall not begin to run before the day on which the beneficiary ceases to be a minor."

26 In support of his assertion that a breach of fiduciary duty by a director should be treated as a breach of trust, Mr. Renouf referred to the position in England. He cited in particular the case of *Gwembe Valley Development Co. Ltd. v Koshy* (2004) 1 BCLC 131 where the court held that, although personal claims against fiduciaries would normally be subject to limits by analogy with claims in tort or contract, by contrast, claims for breach of fiduciary duty against a director would normally be covered by section 21 of the Limitation Act 1980 which dealt with time limits for actions in respect of trust property. It is fair to say that the provisions of section 21 are not wholly dissimilar to Article 53, but they are by no means identical.

27 The court held (para 82) that s 21 of the Limitation Act 1980 applied either by treating the director as a constructive trustee and therefore as being a 'trustee' within s 21, against whom claims are made by the 'beneficiary' (the company) for 'breach of trust' (breach of fiduciary duty) and by treating the profit in question as being 'trust property' for which he is liable to account to the company, or by applying by analogy the statutory limitation periods described for actions by beneficiaries for breach of trust and for recovery of trust property to claims by a company against a director for making an unauthorized profit in breach of fiduciary duty. The judgment involves an erudite analysis of the two different types of constructive trust; how only the first category falls within s 21; and how breaches of fiduciary duty by a director should be treated as falling within that first category. However, the judgment makes it clear that this only applies to a breach by a director which can properly be said to be a breach of his fiduciary duty as opposed to breach of any other duty. Para 85 of the judgment of Mummery LJ reads as follows:–

> ***"The background is provided by another recent case, not directly concerned with s 21*** (***Bristol and West Building Society v Matthew*** (1996) 4 All ER 698 ***in which Millett J provided authoritative guidance as to the proper use of the term fiduciary duty.*** He regretted that this branch of the law had been 'bedevilled by unthinking resort to verbal formulae' [1996] 4 All ER 698 ***at 710,*** [1998] Ch 1 ***at 16:***
>
> > ***'The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which***

> ***attracts legal consequences differing from those consequent upon the breach of other duties.*** Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.'

He distinguished duties, such as the duty of care, which, though owed by fiduciaries, are no different in principle than equivalent duties in common law. He continued ([1996] 4 All ER 698 ***at 711–712,*** [1998] Ch 1 ***at 18):***

> ***'This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory.*** A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of ***loyalty.*** The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations'.

The position was summarized by Mummery L J at para 111 as follows:–

> ***"In the light of those cases, in our view, it is possible to simplify the court's task when considering the application of the 1980 Act to claims against fiduciaries.*** The starting assumption should be that a six-year limitation period will apply — under one or other provision of the Act, applied directly or by analogy — unless it is specifically excluded by the Act or established case law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act, ss 2, 5; see the *Seguros* ***case*** [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112). ***By contrast, claims for breach of fiduciary duty, in the special sense explained in Mathew's case, will normally be covered by s 21.*** The six-year time limit under s 21 (3), will apply, directly or by analogy, unless excluded by s 21(1)(a) (fraud) or (b)(class 1 trust)."

28 In our judgment, Article 53 cannot apply directly to breaches of fiduciary duty by a director. This is because of the particular definition of various terms in the 1984 Law which do not find a parallel in the English statute. Thus:–

The limitation period of three years only applies to an action founded on 'breach of trust' brought against a 'trustee' by a 'beneficiary'.

The expression 'trustee' is defined in Article 2 as follows:–

"ARTICLE 2

Existence of a trust.

A trust exists where a person (known as a trustee) holds or has vested in him or is deemed to hold or have vested in him property (of which he is not the owner in his own right) –

(a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence; ……"

Similarly, breach of trust, is defined in Article 1 as meaning "a breach of any duty imposed on a trustee by this Law or by the terms of the trust".

29 It seems to us that it is very difficult to read these provisions as applying directly to a director of a company. A company's property is not vested in its directors. The 1984 Law is clearly dealing with conventional trusts as they are commonly understood and not to the fiduciary obligation owed by a director to his company.

30 We were referred to *Re Esteem Settlement* (2002) JLR 53 where at paragraph 257 the Court said this:–

"We think that the time has come to hold that the ten year period referred to by Le Geyt is a general period which should be taken to apply to all personal actions and all actions concerning movables, save to the extent that they have already been held to be subject to a different period, e.g. tort, actions concerning estates etc. or that some other period is, by analogy, clearly more applicable. ……"

31 Mr. Renouf argued that, even if Article 53 did not apply directly, we should apply it by analogy. We do not think we can come to a decision on this, as we have not heard full argument and it is not necessary for our decision. However, it does seem to us that practical difficulties may arise. It is clear that Article 53 could only apply by analogy to breaches of fiduciary duty. Indeed *Gwembe* made it clear that in England section 21 only applies to fiduciary duty in the special sense explained in *Mathew's* case, to which we have referred above. Many directors are employed by companies. Some breaches of a director's duty will be a breach of contract and others will be a breach of his fiduciary duty in the special sense described. If Mr. Renouf is right, the former will have a ten year prescriptive period whereas the latter will have a three year prescriptive period. This does not seem very logical or convenient as there will then be endless argument as to whether a particular breach falls within one category or the other. For these reasons, we incline to the view, — but as we say we make no decision, because it is not necessary — that, as set out in *Esteem*, the ten year period should apply to all breaches of duty by a director, whether being described as breaches of contract or breaches of fiduciary duty.

32 Even if Article 53 of the 1984 Law were held to be applicable, there would still be

considerable scope for arguing that paragraph 1(b) would apply in that, if a director, in breach of his fiduciary duty, were to have company property in his possession or under his control or it had previously been received by him and converted to his use, no prescriptive period would apply. That may apply to some of the allegations in the present case.

33 For these reasons, had we not ruled that there was an alternative remedy, we would not have held at this stage that the action proposed on behalf of the Company by Mr. Guenier was not well founded because of difficulties over prescription.

Summary

34 However, for the reasons which we have stated, Mr Renouf's second and third submissions described above do not arise. We will hear counsel on the exact order which we should make and the amount which we should stipulate as being required to fund the liquidation as well as the mechanics for procuring that liquidation.