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Abellan and Others v Standard Chartered Bank

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	22 July 2004
Neutral Citation:	[2004] JRC 131A
Reported In:	[2004] JLR Notes 36
Court:	Royal Court
Date:	22 July 2004

vLex Document Id: VLEX-792649193

Link: <https://justis.vlex.com/vid/abellan-and-others-v-792649193>

Text

[2004] JRC 131A

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq., Deputy Bailiff, sitting alone.**

Juan Antonio Rodriguez Abellan & Others
Plaintiff
and
Standard Chartered Bank (CI) Limited
Defendant

Advocate R.J. Michel for the Plaintiff.

Advocate D.R. Wilson for the Defendant.

Authorities

Bastion Offshore Trust Co. Ltd. v Finance Economics Committee (9th October, 1991) Jersey Unreported; [1991/143], [1991] JLR N1.

[*Fiduciary Management v Sheridan*](#) (7th February, 2002) Jersey Unreported; [2002/34]; [2002] JLR N.11

Makarenko v C.I.S. Emerging Growth Fund [\[2001\] JLR 348](#).

Royal Brunei Airlines v Tan [\(1995\) 3 All ER 97](#).

[*Twinsectra Ltd v Yardley*](#) (2002) AC 164.

[*Wallingford v Mutual Society*](#) (1880) 5 AC 685.

Metropolitan Bank, Ltd v Pooley (1885) 10 AC 210.

[*Associated Leisure v Associated Newspapers Ltd*](#) [\[1970\] 2 All ER 754](#).

Appeal, under Rules 15/2 of the Royal Court (Jersey) Rules, 1992 , as amended against an Order of the Master, dated 21st April, 2004, refusing an application to strike out certain paragraphs of the Order of Justice.

Bailiff

THE DEPUTY

- 1 This is an appeal by the Defendant from a refusal by the Master to strike out certain paragraphs in the Order of Justice. The matter arises out of the activities of a Mr Hammond who solicited funds for investment and opened a number of accounts with the Defendant bank. It is not disputed that Mr Hammond was a fraudster and used the monies in the accounts for improper purposes. He has been sent to prison for various criminal offences and the Plaintiffs, who are a number of the investors, who committed monies to him, have brought proceedings against the Defendant bank.
- 2 The Order of Justice alleges in effect three causes of action — knowing assistance, knowing receipt and negligence. We are concerned today only with the first of those. The Plaintiffs allege that the bank was guilty of knowing assistance. This is summarised at paragraph 26 of the Order of Justice in relation to one of the funds by saying:—

“In all the circumstances the Defendant dishonestly and knowingly assisted Mr. Hammond in his breaches of trust and breaches of fiduciary duty pleaded in paragraphs 21”.

- 3 The Defendant concedes for these purposes that there is sufficient pleaded to allege trust obligations on the part of Mr Hammond and knowledge by the bank that Mr Hammond owed those trust obligations. I emphasise that the bank does not concede that it did in fact know that but it accepts that the matter is pleaded sufficiently for those purposes.
- 4 What the bank says is that there is nothing pleaded which justifies or pleads properly the allegation of dishonesty, which is an essential element of knowing assistance. Mr. Wilson prays in aid the principle in relation to fraud, namely that matters alleging dishonesty must be fully and properly pleaded with all the facts and matters being clearly set out from which an inference of dishonesty is sought to be drawn. The only allegations in the Order of Justice itself which refer to dishonesty, in the sense of knowledge on the part of the bank as to the breach of trust, are those set out in paragraph 24.10, 24.11 and 24.13. The other allegations in paragraph 24 are mainly directed towards establishing knowledge of the trust obligation.
- 5 24.10 says that:

“The Defendant knew that payments out of the WCF accounts were used dishonestly for the benefit of Mr. Hammond, his salesmen and the other companies controlled by Mr. Hammond. The Defendant also knew that the money in the WCF account represented investors money and not the personal money of Mr. Hammond and the payments out of the WCF account were not made in accordance with the instructions of the investors or usual practice when dealing with money which belongs to investors pursuant to a collective investment scheme.”

That is a clear and unambiguous assertion that the bank knew that the payments out of the WCF account were made dishonestly for the benefit of Mr. Hammond. Clearly if the Plaintiff had proper grounds for pleading that, that would be sufficient to amount to an allegation of dishonesty for the purposes of knowing assistance. Particulars were asked of that allegation and these were supplied and I will not quote it all but the answer given after setting out various other matters was:—

“In the circumstances, it is not known prior to discovery whether any of the Defendant's employees actually knew that payments out of the accounts were being made dishonestly but failed to prevent the same, or which payments this applied to”.

- 6 That is in effect, a complete reversal of the allegation in 24.10 that the Defendant did know that the payments were made dishonestly. What the Plaintiffs are saying in the particulars is that they do not know prior to discovery whether the payments were made dishonestly. I have to say that Paragraph 24.10 should never have been pleaded in the form that it was if the particulars accurately represent the state of knowledge of the Plaintiffs and their legal advisors.

7 24.11 asserts:

"The Defendant knew that Mr Hammond was not using all of the money deposited in the WCF accounts or any of it for investment on behalf of the investors."

Again, this is an unambiguous assertion to that effect that the Defendant knew that that was the case and therefore it would of course support an allegation of dishonesty. But when asked for particulars, again leaving out irrelevant parts, the answer was:—

"In the circumstances, it is not known prior to discovery whether any of the Defendant's employees actually knew that payments out of the accounts were not being used for purposes of investment"

Again a complete reversal and it means that in effect there is no allegation of knowledge at this stage and 24.11 should similarly never have been pleaded.

8 Finally, 24.13 reads:—

"The Defendant must have known from the transactions across the WCF accounts that so far as Mr Hammond was repaying investors he could only be doing so with the proceeds of further frauds and money being paid into WCF accounts and was aware from the transactions which took place across the WCF accounts that money received from the investors was not being used for investment but being paid to other parties"

Particulars given in response to a request on that aspect again contain the passage:—

"It is not known prior to discovery herein whether any of the Defendant's employees had actual knowledge of any fraud, when such knowledge was acquired and whether they suspected or queried any such matters"

So again, a reversal of the allegation. It means in effect that all those three allegations simply in effect should have not been made. Without those three, Mr Michel conceded that there was nothing in the pleadings to support the allegation of dishonesty in paragraph 26. Indeed particulars were asked in relation to paragraph 26 as follows:

Of:

"...the Defendant dishonestly and knowingly assisted Mr Hammond...."

Request: This being an allegation of fraud against the Defendant and its employees please give full and proper particulars of the alleged dishonesty and knowledge identifying all relevant employees of the Defendant alleged to be implicated and when and how the knowledge was acquired. Please answer separately as between WCF and CAP.

The answer was as follows:—

"It is not known prior to discovery whether there was any active assistance or encouragement given by the Defendant's staff to Mr Hammond. However the allegation of dishonesty is directed towards the Defendant's failure to make appropriate enquiry in circumstances (as particularised elsewhere) whereby the Defendant should have made enquiry of Mr Hammond, should have been placed on enquiry as to the manner in which the account was being operated, and/or should have declined to act further for Mr Hammond or any of his related entities. It is alleged that the Defendant failed to make such enquiries as a prudent banker would have made in accordance with reasonable banking practice".

- 9 In my judgment that is language which is entirely suited to an allegation of negligence and want of prudence but it is not an allegation of dishonesty. Mr Michel was inclined at one stage to argue that it was sufficient to support an allegation of Nelsonian dishonesty (i.e the turning of a blind eye) but it is of course the case that Nelsonian blind eye dishonesty requires that questions not be asked lest the enquirer find out something that he does not wish to know; in other words he has some suspicions and simply does not wish to find out the truth. That is not alleged by this wording and Mr Michel conceded that it in fact did not do so. In the end therefore, Mr Michel conceded that the allegation of knowing assistance on the current pleading simply could not stand. There is nothing in the pleadings, once they are properly analysed, to support the assertion in Paragraph 26.
- 10 I therefore strike out paragraph 26 and paragraphs 24.10, 24.11 and 24.13 together with the matching paragraphs in relation to the CAP allegations and the consequential paragraphs referred to in the Summons.
- 11 I do however emphasise this. Mr Michel expressed concern at one stage, or rather said that there had been concern on behalf of his clients, that if the allegation of dishonest assistance was struck out this might limit the Defendant's duty of discovery because clearly the Plaintiffs wish to reserve the position and their ability to reintroduce an allegation of dishonest assistance if, following discovery, they think that there is evidence on which they can properly plead such an allegation. I wish to emphasise that Mr Wilson has fully accepted that the fact that this allegation is struck out does not alter the Defendant's obligation on discovery in any way. It must fulfil it to the letter and, given the remaining issues, it is quite clear that any document which might conceivably be material in relation to an allegation of dishonesty would also be a document which would be material for discovery in the sense that it was relevant to the remaining allegations or might lead to a further chain of enquiry. So as I say, the fact that this allegation has, of today, been struck out does not reduce in any way the Defendant's obligations on discovery