Chvetsov v BNP Paribas and Another

Jurisdiction:	Jersey
Judge:	Smith JA
Judgment Date:	19 November 2009
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Date:	19 November 2009

Text

[2009] JCA 220

ROYAL COURT

(Samedi Division)

Before:

Sir John Nutting, **Bt., Q.C., President**; Peter D. Smith, **Esq., C.B.E., Q.C.; and** John V. Martin, **Esq., Q.C**.

Between
Oleg Chvetsov
Applicant/Plaintiff
and
(1) BNP Paribas Jersey Trust Corporation Limited
(2) Maison Anley Property Nominee Limited
Respondents/Defendants

Advocate D. M. Cadin **for the Applicant**.

Advocate J. Harvey-Hills **for the Respondents**.

Authorities

Trust (Jersey) Law 1984.

Re Esteem Settlement [2000] JLR 119.

Glazebrook -v- Housing Committee [2002] JLR N. 43.

Freeman -v- Ansbacher Trustees (Jersey) Ltd [2009] JRC 003.

Stuart-Hutcheson -v- Spread Trustee Co Ltd [2002] 5 ITELR 140.

Alhamrani -v- Alhamrani [2007] JLR 44.

Caparo Industries Plc -v- Dickman [1990] 2 AC 605.

Henderson -v- Merrett Syndicates Ltd [1995] 2 AC 145.

Application for leave to appeal against a decision by the Deputy Bailiff (as he then was) of 19 th June, 2009, allowing an appeal from the Master of the Royal Court on 24 th February, 2009.

Leave to appeal was refused by Vos JA sitting as a single judge on 11 th August, 2009.

Smith JA

Introduction

1 This is an application for leave to appeal against a decision of the Bailiff (then the Deputy Bailiff), striking out the plaintiff's claim against Maison Anley Property Nominee Limited ("MA") on the ground that it disclosed no cause of action. The Bailiff delivered judgment on 19 th June, 2009, and on 22 nd July, 2009, he refused the plaintiff leave to appeal to this Court and gave his reasons in writing. The plaintiff then applied to this Court for leave and this was initially referred to a single Judge, Vos JA, who was furnished with written arguments by both sides and dealt with the application without an oral hearing. In a judgment dated 11 th August, 2009, Vos JA also refused leave. The plaintiff has now renewed his application to the full Court.

Background and the Claims against the Defendants

2 We adopt, with gratitude and some minor adjustments, the summary of the background to

the claims set out in the judgment of the Bailiff of 19 th June, 2009.

3 On 22 nd May, 1996, the plaintiff, as settlor, established a discretionary trust, governed by Jersey law, known as the Metric Trust ("the Trust"). The plaintiff is one of the beneficiaries of the Trust. BNP Paribas Jersey Trust Corporation Limited ("BNP") is a trust company carrying on the business of providing trust services in Jersey and it has at all times been the sole trustee of the Trust. The assets of the Trust include a house in North London ("the Property") which is occupied by the plaintiff and his family. The order of justice pleads at paragraph 2 that MA is a wholly owned subsidiary of BNP which is accustomed to act as BNP's nominee in respect of real property owned by BNP as trustee. The order of justice does not specifically plead that the Property was, during the relevant period, in MA's name as nominee for BNP as trustee of the Trust, but it is clear by inference from the rest of the order of justice that this is what is alleged; indeed there is no dispute on this and the answer of the defendants confirms that the Property was held by MA as nominee for BNP and that MA executed a declaration of trust to that effect in favour of BNP as trustee of the Trust.

4 In about 2001, the plaintiff decided to renovate the Property. Following consultation with the plaintiff BNP agreed to the proposal and on 9 th October, 2001, it passed a resolution authorising MA as nominee on behalf of BNP to execute a contract with a named firm of architects for that firm to design and supervise the project. MA subsequently entered into such a contract. The plaintiff seeks to claim against both BNP and MA that the renovations carried out were more expensive than they should have been and resulted from the failure of BNP and MA to do what they should have done. The plaintiff wishes to make the case against both defendants that they failed to exercise requisite skill and care in that they failed to monitor, control or supervise the works of the architect which led to cost and time overruns. Furthermore, it is said that they failed to consult with or otherwise keep the plaintiff informed of the increased costs. As a result the plaintiff and/or the Trust and its beneficiaries have suffered losses, including in excess of £500,000 in unnecessary and additional costs incurred, an overpayment to the contractor of some £139,523, irrecoverable legal costs and the costs of adjudication proceedings against parties involved in the works. The remedy sought is reconstitution of the trust fund.

5 The claim against BNP is a conventional claim for breach of trust on the basis that BNP, as trustee of the Trust, was in breach of its duties as trustee in relation to the renovation works. BNP denies that this is so but no legal point arises and the matter will fall for adjudication in due course at trial.

6 MA, on the other hand, argues that there is no reasonable cause of action pleaded against it. Essentially, the allegation against MA is that it had legal title to the Property, which it held as nominee for BNP as trustee of the Trust, and, on BNP's authority, entered into the relevant contracts as nominee for BNP and took steps consequent upon those contracts. There is no allegation that MA was at any time anything other than a nominee for BNP. The order of justice characterises the basis of the plaintiff's case against MA in two ways: the

first can conveniently be called the trust claim and the second the claim in tort.

(i) The Trust Claim

The Trust duties are pleaded at para. 10 of the order of justice as follows:-

> *"10 BNP and MA, as BNP's nominee, were under the following duties in its management of the Trust and in particular of the Works, namely:-*
>
> *(1) pursuant to Article 21(1) of the Trusts (Jersey) Law 1984 to act in its administration of the Trust with due diligence, as would a prudent person, and to the best of its ability and skill, and at all times to observe the utmost good faith.*
>
> *(2) pursuant to Article 21(3) thereof to take all reasonable steps for the preservation and enhancement of the trust estate (being in this case primarily the Property),*
>
> *(3) generally to exercise such care and skill as was reasonable in the circumstances, having regard in particular:-*
>
> *(a) to any special knowledge or experience that it had or held itself out as having,*
>
> *(b) by reason of acting as Trustee of the Trust in the course of its business, to any special knowledge or experience that it was reasonable to expect of a person acting in the course of that kind of business and*
>
> *(c) to the special care and skill to be expected of a specialist trust corporation carrying on the business of trust management, including the ownership of real property in England."*

(ii) The Claim in Tort

This claim is put as follows in para. 11 of the order of justice:-

> *"Despite being aware of Mr Chvetsov's total reliance on BNP for all matters connected to the Trust, at no time did BNP or MA inform Mr Chvetsov, still less obtain his agreement, that neither BNP nor MA would be taking any steps or actions to monitor, in the most general sense, the Works nor was Mr Chvetsov informed that neither BNP nor MA would be exercising any supervision whatever over the Works or the Architect and would in effect be doing no more than making whatever payments the Architect certified or requested."*

The order of justice continues:-

> *"(12) Accordingly, under the circumstances set out in para. 11 above, each and both of BNP and MA, in discharge of their duties as pleaded at paragraph 10 …, required the observance by BNP and MA of a duty of care to Mr Chvetsov in tort*

not to cause damage to him and that each and both of BNP (sic) then should …"

There then follow a number of matters which it is said BNP and MA should or should not have done in relation to the works of renovation.

The Tests

7 It is not disputed that the test as to whether the order of justice discloses a reasonable cause of action is that adumbrated by the Bailiff in *In Re Esteem Settlement* [2000] JLR 119, p.127 in the following terms:-

> ***"It is only where it is plain and obvious that the case cannot succeed that recourse should be had to the summary jurisdiction to strike out.*** To quote from para. 18/19/10 of 1 The Supreme Court Practice 1999, at 349:
>
> > ***'So long as the statement of claim or the particulars disclose some cause of action, or raise some questions fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out.'***
>
> ***This is particularly so in an uncertain and developing field of law."***

Nor was it disputed that the test for the granting of leave in respect of interlocutory appeals is as laid down by this Court in *Glazebrook -v- Housing Committee* [2002] JLR N43 as follows:-

> ***"(i) Is there a clear case of something having gone wrong?***
>
> ***(ii) Is there a question of general principle to be decided for the first time?*** or
>
> ***(iii) Is there an important question of law upon which further argument or a decision of the Court of Appeal would be to the public advantage?"***

The Grounds of the Proposed Appeal

8 These are set out in the plaintiff's Notice of Appeal dated 3 July 2009 in the following terms:-

> *"1 In the circumstances of this case where (i) MA was appointed for BNP's convenience only, and/or (ii) there was complete commonality of personnel between BNP and MA, and/or (iii) such duties are envisaged in the trust documents, the Royal Court erred in holding that:*
>
> > *(1) MA did not owe duties directly to the beneficiaries under the Trusts (Jersey) Law 1984 equivalent to those owed to the*

beneficiaries by BNP;

(2) MA had not, by accepting such appointment as mentioned above, assumed and did not accordingly owe duties of care in tort to the beneficiaries; and

(3) such duties could never be owed to the beneficiaries.

2 The Royal Court erred in holding that there could never be a "gap" in the liabilities of the trustee and such a delegate such that a beneficiary might be left without recourse for claims of breach of trust or in tort.

3 The Royal Court erred in holding that, even if such a gap existed, a beneficiary must pursue an administrative or derivative action against the trustee in order to assert claims against such a delegate or agent and can never pursue such claims directly against that delegate or agent, in particular where (i) prior to discovery such beneficiary will not have access to the documentation of the trustee to determine which powers and duties have been delegated to the delegate or agent, and/or whether liability arises under the principles laid down in Caparo -v- Dickman or there has been a voluntary assumption of responsibility, and (ii) for a beneficiary to have to wait until discovery in proceedings against the trustee could lead to such actions being prescribed.

4 The Royal Court erred in its decision in that as a matter of public policy:

(1) additional hurdles should not be placed before beneficiaries seeking to make claims for breach of trust and/or in tort unless absolutely unavoidable; and

(2) agents appointed by trustees to act in place of such trustees ought to be held to owe duties directly to such trustees' beneficiaries."

The Notice of Appeal has to be considered by us on the basis that the relevant factual matrix set out expressly or implicitly in the plaintiff's pleadings and particulars would be proved if the case against MA were to go to trial. It is convenient at this point to record that we understand "the gap" referred to in paragraph 2 to be the difference between the liability of the nominee or agent to the trustee and what would otherwise be the liability of the trustee to a beneficiary.

The Refusals of Leave to Appeal

9 Both the Bailiff and Vos JA refused leave for much the same reasons. As far as the trust claim was concerned, the duties pleaded are taken from the Trust (Jersey) Law 1984 but have no application. Although MA held the Property on a bare trust for BNP this did not make it a trustee of the Trust, the remedy for any breach of the bare trust lying with BNP and

not with the beneficiaries of the Trust. Any duties owed by MA as an agent or delegate appointed by BNP in its capacity as trustee were owed to BNP and any remedy for breach would lie with BNP.

10 Turning to the claim in tort, the Bailiff's view is succinctly recorded in the statement that:-

> ***"An agent or delegate of a trustee owes a duty in contract (and possibly tort) to his principal (in this case BNP as trustee of the Trust) but, in the absence of particular factors, he owes no duty of care towards the beneficiaries of the Trust*** ." Implicit in this statement is the conclusion that no such " *particular factors"* have been raised in the pleadings or particulars furnished in this case.

11 In respect of this claim Vos JA said:-

> ***"[T]here are no facts pleaded or relied upon which in any way support the proposition that MA must have accepted a duty of care to the beneficiaries of the Metric Trust – or, as required on authority, assumed responsibility to them."***

The Plaintiff's Argument in this Court on the Trust Claim

12 Advocate D M Cadin for the plaintiff predicated his submissions in relation to this claim on the assertions that MA was a wholly owned subsidiary of and controlled by BNP, that there was complete commonality of personnel between the two companies and that it was BNP's standard practice to interpose MA between itself and any property transaction. He suggested that the reason for this interposition and for BNP going to the trouble of trying to remove MA as a defendant might be to enable BNP to escape liability by taking advantage of the "gap". However, the plaintiff's difficulty was that MA's application has been brought prior to discovery, only after which it would be come clear whether or not such a gap existed. Mr Cadin referred us to a passage in the plaintiff's replies to the defendants' notice for further and better particulars as providing the basis for his argument. It reads as follows:-

> *"In the absence of any denial, it is … to be inferred that BNP intended to act properly and in utmost good faith in appointing MA from which it follows that BNP must itself have accepted, and in so doing caused MA to accept either impliedly or expressly, that MA would accept, adhere to and discharge duties to the beneficiaries of the Trust no less onerous than those to which BNP itself was subject and to which BNP would have been subject had it not chosen to interpose MA into the transactions connected with the Works."*

Advocate Harvey-Hills, who appeared for the defendants, objected to Mr Cadin's reliance on particulars. We do not accept this objection. If there is a problem, it could readily be cured by an unexceptionable amendment to the order of justice.

13 On the basis of this passage Mr Cadin contended that MA owed duties to the beneficiaries analogous or identical to those of BNP. While accepting that there is no direct authority for the proposition that in the circumstances alleged an entity becomes subject to the duties owed by a trustee of a trust to the beneficiaries, Mr Cadin argued that as the law of trusts is constantly developing the fact that the claim may be novel does not necessarily mean that it must be struck out. He drew our attention to a passage in the judgment of the Bailiff in *In Re Esteem* (op. cit. page 135) which reads as follows:-

"The law develops by novel points being taken. On many occasions they fail but sometimes they are accepted, even if not at first."

In this context, Mr Cadin also referred us to *Freeman -v- Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003; *Stuart-Hutcheson -v- Spread Trustee Co Ltd* [2002] 5 ITELR 140; and *Alhamrani -v- Alhamrani* [2007] JLR 44.

Our Conclusions on the Trust Claim

14 In our opinion it is not possible to deduce what it is said is to be inferred in the passage from the plaintiff's particulars we have quoted; the factual basis is simply too thin. Taken at their height, the plaintiff's pleadings and particulars go no further than to assert that a company with the characteristics of MA, and having been appointed to act as nominee or agent of a trustee, owes the same duties as does the trustee. This is a novel proposition and we must consider the circumstances in which such a new claim might be entertained when there is no authority to support it.

15 The Jersey law of trusts is derived from the English law of trusts insofar as it has not been modified by statute. Whatever the position as far as Jersey customary law is concerned, English law develops incrementally, new developments being added as a logical extension of whatever has already been established, usually on the basis of necessity. In this process the doctrine of precedent performs an important controlling role although the appropriate application of recognised principles is also acceptable, particularly in fields, such as trusts, which originated in the old Courts of Chancery.

16 The plaintiff's fundamental difficulty in relation to the trust claim is that just as there is no basis for it in authority, neither is there any in principle nor, for that matter, in logic. Trusts have been around for a very long time and there has been a good deal of litigation concerning them. The use by trustees of agents and nominees is not a recent phenomenon. Had there been any valid reason requiring a nominee or agent to be subjected to the duties imposed on the trustee making the appointment we would have expected to be able to find it. In our opinion, as the Bailiff put it in paragraph 20 of his judgment dealing with the leave application, the argument that MA owed duties as a trustee or analogous or similar to those of a trustee is completely untenable and doomed to failure.

17 For the sake of completeness we would add that we do not accept that factors such as the

commonality of personnel or BNP's control of MA make any difference. If the engagement of nominees and agents by trustees is permissible and does not, without more, impose on those engaged the duties owed by trustees to beneficiaries we cannot see how the factors referred to could, of themselves, possibly have the effect of imposing them. Looked at from another point of view, MA does not appear to be in any different position from an employee of BNP who was required by BNP to do the things MA did in this case. Is it to be argued that such an employee thereby became subject to the duties of the trustee? We do not consider this to be a tenable proposition although, in our view, it is the logical corollary of Mr Cadin's arguments on this issue.

18 We would also add that we do not accept that the hypothetical and unpleaded gap suggested by Mr Cadin makes any difference either. If it transpires that such a gap exists it would be a matter for BNP, if it can, to justify it. But irrespective of whether or not BNP succeeds in this respect we cannot follow the argument that the existence of such a gap or any consequence of it could have the effect of imposing the duties contended for on MA.

19 Turning to the authorities to which Mr Cadin referred us, we observe that in *Freeman -v- Ansbacher Trustees* the Bailiff refused a strike out application on the basis that there was considerable uncertainty as to whether the principle that would have defeated the plaintiff's claims applied and gave no less than fourteen reasons as to why it was strongly arguable that the principle did not apply. That case is really the antithesis of the instant case and the contrast it provides makes instructive reading.

20 *Stuart-Hutcheson -v- Spread Trustee Co Ltd* is a decision of the Guernsey Court of Appeal. In confirming the entitlement of a discretionary beneficiary with no vested interest in a trust to certain information relating to it, the court held that the minutes of a company, described as the creature of the trustee, were also liable to be produced. We do not believe that this authority lends any significant support to the plaintiff's trust claim. The ruling of the court was not grounded on a finding that the company owed the duties of the trustee to the beneficiaries which does not appear to have been argued before it, but rather on the fact that in reality the trustee had control of all of the material held by its creature.

21 In *Alhamrani -v- Alhamrani*, Page Commissioner refused to grant leave to the plaintiffs, beneficiaries of certain trusts, to amend their pleadings to introduce dog-leg claims against directors of the companies that were trustees of the trusts. In doing so the Commissioner acknowledged that "… it would be ostrich-like not to recognise that the boundaries of received learning are, from time to time, stretched by courts in what they conceive to be a necessary or desirable direction in order to do justice" and went on to hold that the law in the area in question could not really be said to be in a state of active development when there had been only two reported cases in which the type of claim in question had been expressly considered (page 63). We note that our own approach also makes reference to necessity. We think that it is arguable that the reference to a " ***developing field of law"*** in the *Esteem* test (see paragraph 7) should be construed as requiring active development. But this makes no difference in the instant case. The law in the area identified by Mr Cadin cannot be said to be in a state of development, never mind active development.

We cannot accept the plaintiff's argument on this issue.

The Plaintiff's Arguments in this Court on the Claim in Tort

22 Mr Cadin contended that by acting in place of BNP, with knowledge, by virtue of what he called “the community of management”, of the duties owed to the beneficiaries by BNP, MA must necessarily have accepted a duty of care directly to those to whom BNP owed a duty of care, including the plaintiff. He referred to the cases of *Caparo Industries Plc -v- Dickman* [1990] 2 AC 605 and *Henderson -v- Merrett Syndicates Ltd* [1995] 2 AC 145.

Our Conclusion on the Claim in Tort

23 In order for the plaintiff to succeed on the basis of the principles enunciated in these cases the plaintiff would have had to rely on negligent advice by MA and MA would have had to know that this might be the case (*Caparo*) or there would have had to be facts alleged from which it could be said that MA had assumed responsibility to the beneficiaries of the trust (*Henderson*). However, as the Bailiff pointed out in his judgment on the leave application, facts sufficient to ground either such claim cannot be identified in either the pleadings or particulars in the instant case. Moreover, it seems to us that the plaintiff's claim in tort, grounded as it is in the allegations of negligence, is fundamentally deficient in that the order of justice claims reconstitution of the trust and not damages for loss sustained by the plaintiff. There are three things that must be established in order to bring home a claim in negligence: duty, breach and damage. The last must be damage to the plaintiff. The damage asserted in this case is to the Trust.

Accordingly, we also reject the plaintiff's argument on the claim in tort.

Discovery

24 As we have said, Mr Cadin pointed out that evidence of the gap to which he referred would only become available after discovery and this has not yet taken place. He argued that for this reason the strike out application should be dismissed. We cannot accept this. The question on a strike out application is whether the test for such an order has been met. The test for leave to appeal is as stated in *Glazebrook*. Whether or not discovery has taken place is irrelevant to each of them. The application has to be considered on the plaintiff's case as pleaded and particularised. A strike out application that otherwise should be granted cannot be refused on the basis (as Vos JA put it, referring to Dickens' Mr Micawber) that “ *something will turn up”*.

Disposal

25 In our opinion none of the criteria in *Glazebrook* has been met and accordingly leave to appeal is refused.