Eveline Frances Berry (personal representative of Richard John Berry deceased) v B.T. Trustees (Jersey) Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	11 September 2000
Neutral Citation:	[2000] JRC 179
Reported In:	[2000] JRC 179
Court:	Royal Court
Date:	11 September 2000

Text

[2000] JRC 179

ROYAL COURT

(Samedi Division)

Before:

M.C. St.J. Birt, **Esq**., Deputy Bailiff, **and** Jurats Le Breton, **and** Allo.

Between
(1) Eveline Frances Berry (personal representative of Richard John Berry deceased)
(2) John Bruce
(3) Anthony Charnock
(4) Dornley Investments Limited
(5) David Green
(6) Martin Holloway
(7) Ian Krendel

(8) Trevor Lawson
(9) Neil Lawson-Baker
(10) Nicholas Berkeley Mason
(11) Morntane Limited
(12) Richard Oldworth
(13) John Scott & Partners Limited
(14) Peter Sugden
(15) Anthony Swiffen
(16) John Wallace
(17) Peter Warne
(18) Richard Wills
Plaintiffs
and
B.T. Trustees (Jersey) Limited
First Defendant
Philip George Bisson (joined as First Third Party at the instance of the First Defendant)
Second Defendant and First Third Party
Philean Trust Company Limited (joined as Second Third Party at the instance of the First Defendant)
Third Defendant and Second Third Party

Advocate P. Landick **for the Plaintiffs;**

Advocate R.J. Michel **for the First Defendant;**

Advocate M. Preston **for the Second Defendant/First Third Party; and for the Third Defendant/Second Third Party**.

Authorities

Sumner v Henderson (1963) 1 WLR 823 C.A.

Re Esteem Settlement (27th July, 2000) Jersey Unreported C of A.

Richards v Naum (1996) 3 All ER 812 C.A.

Purdie & Anor v Bailhache & Bailhache (1989) JLR 111 C of A.

R.S.C. (1999 Ed'n): Vol 1: 18/11/1.

Public Services Committee v Maynard (1996) JLR 343 C of A.

Application by the Plaintiffs for an Order that the following questions or issues of fact and law be heard as a preliminary issue in this action before the hearing of the action and that until the determination of the preliminary issue all further proceedings in the action be stayed, namely:

(i) Whether the provisions of Article 28 (1) of the Trusts (Jersey) Law 1984 (as amended) are available to protect the First and/or Second Defendants against claims made by the Plaintiffs under a contract made between the said Defendants and the Plaintiffs and governed by English law; and

(ii) If they are so available, on what date the "trust property" is to be ascertained for the purposes of the said Article 28 (1).

Bailiff

THE DEPUTY

1 This is an application by the Plaintiffs for an order that there be a trial of a preliminary issue in the following terms:-

> *"That the following questions or issue of fact and law be heard as a preliminary issue in this action before the hearing of the action and that until the determination of the preliminary issue all further proceedings in the action be stayed, namely:*
>
> > *(i) Whether the provisions of Article 28 (1) of the Trusts (Jersey) Law 1984 (as amended) are available to protect the First and/or Second Defendants against claims made by the Plaintiffs under a contract made between the said Defendants and the Plaintiffs and governed by English law; and*
> >
> > *(ii) If they are so available, on what date the "trust property" is to be ascertained for the purposes of the said Article 28 (1)."*

2 The factual background to the case is that the Plaintiffs issued an Order of Justice on 10 th May, 1995, which was amended on 5 th July, 1995. In essence the Plaintiffs assert that they and the First Defendant were shareholders in a company called Medina Engineering Limited in respect of which litigation in England has taken place.

3 It is alleged that in 1992 the Plaintiffs entered an agreement with the First Defendant in respect of contributions to the cost of litigation incurred by the shareholders. The Plaintiffs now claim £125,516, together with interest, as being the First Defendant's share of the costs incurred. It is asserted that the agreement is governed by English law.

4 The Order of Justice states that, when returning the letter which constituted the agreement, the First Defendant enclosed a copy of some minutes indicating that the First and Second Defendants were trustees of a settlement known as the Mayne settlement and that it was in that capacity that they were parties to the litigation. In fact, it would appear that it was only the First Defendant which was party to the litigation or entered into the agreement.

5 As an alternative, the Plaintiffs plead that the Second Defendant is jointly and severally liable with the First Defendant because he was, at all material times, a co-trustee of the Mayne settlement and the agreement was entered into by the First Defendant on behalf of both the trustees. As a further alternative, the Plaintiffs claim against the Third Defendant, which replaced the First Defendant as co-trustee in December, 1994.

6 The Answer of the First Defendant does not appear to dispute many of the alleged facts but it does deny liability. It also asserts that there was no agreement for interest on outstanding contributions; it further asserts that any liability is limited to the trust property in the First Defendant's hands because it gave notice at the time that it was entering the agreement as trustee of the Mayne settlement. Since it ceased to be a co-trustee in December, 1994, it holds no assets and it asserts that it is therefore not liable. It then goes on to say that, if it is liable, it is entitled to be indemnified by the present trustees, i.e. the Second and Third Defendants. The Answer of the First Defendant does, however, admit that the agreement in question was governed by English law.

7 The Answers of the Second and Third Defendants are in similar form. They deny owing £125,560. In particular they assert that the agreement to contribute was limited to costs arising in respect of instructing leading counsel, drafting of a defence, and those incurred prior to the date of the agreement. They also dispute liability for interest and assert that any liability which they may have is limited to the trust property in their hands. They do not specifically deny that the agreement is governed by English law, but they certainly do not admit it, and they have included in their Answer a general denial of all those matters not admitted.

8 This litigation has followed a dilatory course. The matter was set down for hearing on 13 th October, 1995, and orders were made for mutual discovery to take place in 28 days. We are told that the Plaintiffs did not file their affidavit of discovery until 6 th January, 1997, and this was followed shortly by the Second and Third Defendants in March, 1997. The First Defendant had complied promptly. Nothing then apparently happened until March, 1998, when the Plaintiffs supplied certain further documents. On 30 th April, 1998, the Plaintiffs' advocates wrote to say that they would shortly be setting the matter down for a trial date.

9 The next step appears to have been taken by the Second and Third Defendants who sought further specific discovery against the Plaintiffs in March 1999. Subsequently, an ‘unless order’ was made against the Plaintiffs in respect of that discovery on 27 th May, 1999.

10 On 2 nd September, 1999, the Plaintiffs' advocates wrote to say that they would be applying for a hearing date at the expiry of seven days. In fact no such application has been made but, following correspondence, the Plaintiffs applied on 4 th May, 2000, for a date for the present summons. In other words nearly five years after the matter was put on the hearing

list the Plaintiffs have now applied for the trial of a preliminary issue. In the meantime some of the Defendants have applied to strike the action out for want of prosecution and this is fixed for hearing before the Master on 17 th October. Nothing we say in our judgment today should be taken as any indication one way or the other of our views on that hearing and we have, of course, heard no submissions upon it.

11 We turn to consider briefly the applicable legal principles when considering whether to order the trial of a preliminary issue. We have been referred to a number of authorities but we propose only to cite briefly the following. The first is *Purdie & Anor v Bailhache & Bailhache* (1989) JLR 111 C of A, and we refer to the passage at page 115 where the Court of Appeal said this:-

> ***"The description of preliminary points of law as being*** (*Tilling v. Whiteman* [1980] A.C. at 25) ***"too often treacherous short cuts" whose "price can be delay, anxiety and expense" is not apt to describe preliminary issues in which facts and issues of law are found by the courts within the framework of the separate trial.*** Nevertheless, some cautionary note needs to be sounded before the courts too readily indulge in carving up parts of an action. A single trial of all issues is the traditional mode of trial under the English system of litigation. And we do not think that, in essence, the general approach has been any different in this jurisdiction, although we are aware that, because of the size of the judiciary, the inclination to short-cut litigation has been more pronounced. We are comforted in coming to that conclusion by a decision of the Deputy Bailiff in *Abdel Rahman v. Chase Bank (C.I.) Trust Co. Ltd.* ***In that case, an application sought an order that the hearing of the issues of the validity of a settlement should be adjourned pending determination by the court, whether the settlement was valid or invalid under the rule of Jersey law that donner et retenir ne vaut.*** The Deputy Bailiff cited two paragraphs from 37 Halsbury's Laws of England, 4 th ed., Practice & Procedure, paras. 483–484, at 366–367, and concluded from those paragraphs:
>
> > ***'It follows that, although separate trials of separate issues should be regarded as a departure from the norm and that exceptional circumstances or special grounds are required, I do have, within the exercise of my discretion, wide powers to order the separate trial of separate issues.*** If there are special grounds, it is indeed for the court to regulate its own procedure….'
>
> ***We endorse that approach*** ."

12 The second authority we would like to cite is *Public Services Committee v Maynard* (1996) JLR 343 C of A at page 360 when the Court of Appeal said this:

> ***"It appears from the order of the Judicial Greffier of September 30 th, 1994 that the issue he ordered to be heard as a preliminary issue, "whether the plaintiff's right of action is prescribed," was an issue of both fact and law.***

> In the event, it was argued before the Lieutenant Bailiff and before this court simply as involving points of law. To choose points of law such as these for initial decision seems to us to be within the current practice of the Royal Court of Jersey. However, in our judgment, the Royal Court should reconsider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or ***she is to receive damages for his or her injury and receives the damages awarded.*** Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues together."

13 Next we would cite the recent decision of the Court of Appeal in *Re Esteem Settlement* (27th July, 2000) Jersey Unreported C of A. We refer in particular to the whole of paragraph 31 which sets out the approach which the Court of Appeal thought the Royal Court should take as to the management of cases, and in particular sub paragraph (3) of that paragraph which reads:

> " ***From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be to progress those proceedings to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time."***

14 Finally, we would refer to the case of *Richards v Naum* (1996) 3 All ER. 812 C of A and we can content ourselves with citing from the headnote which says:

> ***"Held: the facts should be ascertained before the issue of law was determined, as the extent of such absolute privilege as was claimed and the circumstances to which it applied were not settled in English law; accordingly the question of absolute privilege would not be decided by way of preliminary point of law."***

The point was developed in the judgment of all three judges.

15 We draw from these authorities the principle that, in general, all matters should be resolved at the trial. It is the exception to order that the case should be broken down into separate issues. This is particularly so where the facts may be in issue as the Court should not decide legal issues, particularly novel issues, on the basis of what may turn out to be erroneous facts or on the basis of hypothetical facts. The Court can however, and often will, order the trial of a preliminary issue if satisfied that it is convenient to do so and that the resolution of the preliminary issue in one way would be likely to be determinative of the whole case, or at any rate of a very substantial part of it, thereby saving time and costs.

16 We have carefully considered the arguments put forward by all the parties in this case. We

have concluded that there should not be a trial of a preliminary issue. Our reasons briefly are as follows:-

17 First, we accept that the interpretation of Article 28 of the Trusts (Jersey) Law 1984 is an important and complex point of law. It should be done on the basis of known facts, not of hypothetical facts and we refer again to the *dicta* in the case of *Richards v Naum*.

18 The Second and Third Defendants have not admitted that the agreement in question was governed by English law. Mr. Michel says that, following the discovery obtained in 1999 from the Plaintiffs, he wishes to amend his pleadings to withdraw the concession that the agreement is governed by English Law. There is therefore a real possibility that the preliminary issue would be decided on a false factual basis, or at any rate one which was not admitted. Even the Plaintiffs admitted that there are several possible different times at which Article 28 could take effect in relation to ascertaining the trust property. Examples of different dates could be the date of the agreement; the date of the first warning of a claim; the date of the bringing of a claim; the date of the resignation of the First Defendant as trustee; or the date upon which the First Defendant handed over assets. In our judgment it would be extremely unwise to reach a decision in the absence of a factual basis, and in particular in the absence of a decision on the dates on which these events occurred in the present case.

19 Secondly, the preliminary issue would not be decisive. It might, on one outcome, result in the Plaintiffs deciding not to proceed against the First Defendant but the case against the Second and Third Defendants would have to proceed in any event. It would therefore be the case that the trial of a preliminary issue (with possible appeals on what would, on any view, be an important and undecided point of law) would delay the main hearing by a substantial margin.

20 Thirdly, this case has already been delayed for far too long. It started in May, 1995, and there is still no fixed hearing date. We are not prepared to countenance any further delay and we think it is now too late for the Plaintiffs, some five years after the case was set down for hearing, to suggest that there should be a hearing of a preliminary issue. This case should be brought to a conclusion as soon as possible and in our judgment that is best achieved by proceeding to have a trial of all the issues against all the Defendants as soon as possible. That trial would resolve both the factual and the legal issues.

21 These are the reasons for our decision. We should add that we have been told during the course of oral submissions today that, in the light of matter appearing from the discovery given by the Plaintiffs, the Defendants now wish to adduce additional grounds for denying liability under the agreement. Logically, the question of whether there is liability at all under the agreement precedes the question of whether Article 28 protects any of the Defendants from liability which would otherwise exist. If leave to amend is granted, as to which we make no observations, this would be an additional reason for concluding that this is not a case where a trial of a preliminary issue would assist.

22 For those reasons therefore we refuse your application, Mr. Landick.