Chvetsov v BNP Paribas

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	22 July 2009
Neutral Citation:	[2009] JRC 141, [2009] JRC 120
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Text

[2009] JRC 120

ROYAL COURT

(Samedi Division)

Before:

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

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

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

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

Authorities

Royal Court Rules.

Re Esteem Settlement [2000] JLR 119 .

Trusts (Jersey) Law 1984.

Lewin on Trusts (18th Edition) at para 43–05.

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

Alhamrani v Alhamrani [2007] JLR 44 .

Rae v Meek (1889) 14 App Cases 558 .

Caparo Industries Plc v Dickman (1990) 2 AC 605 .

Henderson v Merrett Syndicates Limited (1995) 1 AC 145 .

The Deputy Bailiff

1 This is an appeal against the decision of the Master on 24th February, 2009, when he dismissed the application to strike out the plaintiff's claim against the second defendant.

2 The application was brought under RCR 6/13(1), namely that the order of justice discloses no reasonable cause of action against the second defendant. It follows that no evidence has been filed and the matter must be considered on the basis of the facts pleaded in the order of justice.

3 The test to be applied in such cases is conveniently summarised in *Re Esteem Settlement* [2000] JLR 119 at 127:-

> ***"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 question 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."

Background

4 On 22nd 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. The first defendant ("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 included 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 the second defendant ("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. Somewhat surprisingly, the order of justice does not specifically plead that the Property was, during the relevant period, registered in MA's name as nominee for BNP as trustee of the Trust, although 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.

5 In about 2001, the plaintiff decided to renovate the Property. Following consultation with the plaintiff BNP agreed to the proposal and on 9th 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 now claims that the renovations carried out were, in the event, more expensive than they should have been and resulted from the failure of the defendants to do what they should have done. The plaintiff says that the defendants 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.

The claim

6 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.

7 MA, on the other hand, argues that there is no reasonable cause of action pleaded against it. So how is the case put in the order of justice? The sole factual allegations are that MA was acting as BNP's nominee in entering into the contract with the architect (para 14) and with the contractor (para 21). Subsequently it is pleaded that MA, or solicitors on its behalf, entered into correspondence concerning the defects, extensions etc. This would of course follow on from the fact that it was the contracting party. In essence therefore, the sole allegation is that MA 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.

(i) The trust claim

8 The order of justice alleges that MA owed duties both as a matter of trust law and in tort. 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."***

9 I have to say that I do not see how, as a matter of law, MA could possibly owe such duties to the plaintiff or other beneficiaries of the Trust. The duties pleaded are taken from the Trusts (Jersey) Law 1984 ("the 1984 Law"). That Law sets out the duties owed by a trustee of a trust. There is however no suggestion that MA was trustee of the Trust; on the contrary it is expressly pleaded in the order of justice that BNP was at all material times the sole trustee of the Trust. The references to the 1984 Law are therefore irrelevant in the case of MA.

10 The legal position is that MA was simply an agent or delegate appointed by BNP in its capacity as trustee of the Trust. If MA were to act negligently or beyond its authority in connection with that agency or delegation, the remedy would lie with BNP as trustee of the Trust. Any duties owed by MA in connection with its appointment were owed to BNP as

trustee of the Trust, not to the beneficiaries. It would be similar in the case of an investment manager appointed by a trustee to manage the investments of a trust. If that investment manager were to be negligent in the performance of his duties, the cause of action would lie with the trustee, not with any beneficiaries.

11 It is true that MA was in one sense a trustee because it held the Property as nominee (i.e. on bare trust) for BNP as trustee of the Trust. However this was a completely separate matter from acting as trustee of the Trust. MA held the Property on bare trust for BNP as trustee of the Trust and the remedy for any breach of that bare trust lies only with BNP, which, in its capacity as trustee of the Trust, was the sole beneficiary of the bare trust. The fact that MA was acting as nominee for BNP cannot possibly mean that, simply as a result of so acting, MA thereby assumed the obligations of a trustee towards the beneficiaries of the Trust.

12 I pressed Mr Cadin on whether his researches had disclosed any case which established that an agent appointed by a trustee of a trust owed duties under trust law to the beneficiaries of the trust, merely by reason of such appointment, but he said that he had not found any such case. I further asked him whether there was any suggestion in any of the text books that such a duty might exist but he accepted that he had not found anything to this effect.

13 Mr Cadin raised three arguments as to why I should hold that, despite the absence of precedent, the claim against MA was arguable.

14 Firstly, he pointed out that the boards of BNP and MA were the same. There was complete commonality of personnel between the two companies. He submitted that, even if, in the case of an independent agent, no duties in trust law were owed by an agent to the beneficiaries, an exception should be made where the agent was a close associate of the trustee. I can see no grounds for introducing such a concept, nor any purpose in doing so. If there has been a breach of trust by the trustee, a claim will lie against the trustee on the part of the beneficiaries. If the agent has been in breach of his contractual duties towards the trustee, the trustee will have a claim against the agent. If the trustee (perhaps because of a close association) refuses to enforce its claim against the agent, the beneficiaries may institute an administrative action seeking a direction from the Court that the trustee take the necessary action against the agent or alternatively perhaps that the trustee be replaced. As an alternative to an administrative action, the beneficiaries may in special circumstances institute a derivative action on behalf of the trust (see for example Lewin on Trusts (18th Edition) at para 43–05). However, the closeness of the relationship between the trustee and the agent cannot in my judgment lead to the agent assuming duties as a trustee where this would not be so in the case of an independent agent. I should add that Mr Cadin accepted that the plaintiff was not purporting to bring a derivative claim in the order of justice.

15 Secondly, Mr Cadin argued that, unless the beneficiaries were allowed to bring an action against a negligent agent or delegate, there could be a gap where no remedy would lie. He

pointed out that, like many trust deeds, Clause A10.03.01 of the trust deed in this case provided that the trustee shall not be liable for "….. the negligence or fraud of any delegate or agent appointed or employed by the Trustees or any of them in good faith although the appointment or employment of such delegate or agent was not strictly necessary or expedient."

16 Thus, in the case of a defaulting agent who caused loss to the trust fund, the beneficiaries might have no claim against the trustee because of the existence of such an exoneration clause and would also have no claim against the agent. This, he said, would be unsatisfactory and the Court should therefore fashion a remedy to allow the beneficiaries to bring an action directly against the defaulting agent or delegate.

17 However, that is to ignore the fact that the trustee would have a cause of action against the defaulting agent and would therefore be able to obtain restitution of any loss to the trust fund. In the event of a trustee failing to enforce that right, the beneficiaries would have a remedy either by way of an administrative action to force the trustee to take action against the agent or by a derivative action, as described in paragraph 14. Accordingly I do not agree with Mr Cadin that there is a gap. Even if I am wrong, and there is such a gap, I do not consider that this would entitle the Court to impose duties in trust law on an agent or delegate when there is no legal principle which would enable that to be done.

18 Thirdly, Mr Cadin argued that this was a developing area of the law. He pointed out my own observations referred at para 3 above to the effect that particular caution in relation to a strike out application is required in an uncertain and developing field of law. He referred to *Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JRC 003 and argued from this case that this was a developing area of law. It was very much on this ground that the Master declined to strike out the claim against MA.

19 I cannot agree that this is an uncertain or developing field of law. *Freeman v Ansbacher* concerned an entirely different point relating to the application of the principle against reflective loss to claims by beneficiaries against trustees for losses incurred in a wholly owned subsidiary of the trust. The present case is concerned with whether a beneficiary of a discretionary trust has a claim against an agent or delegate appointed by the trustee of the trust. In my judgment, for the reasons that I have given, the law in this area is entirely clear nor is it developing. I have already mentioned that Mr Cadin was unable to point to any case or textbook where it is suggested that a beneficiary might have a claim against such an agent. In this connection I bear in mind the observations of Page, Commissioner at para 40 of *Alhamrani v Alhamrani* [2007] JLR 44 where he considers when an area of law can be said to be in a state of development.

20 For these reasons I consider that the allegation that MA owed duties as a trustee towards the beneficiaries as set out in para 10 of the order of justice to be completely untenable and doomed to failure.

(ii) Claim in tort

21 As an alternative to the claim in trust law, the plaintiff claims against MA in tort. The matter is put as follows in the order of justice:-

> *"11. Despite being aware of Mr Chvetsov's total reliance on BNP for all matters connected with 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.*
>
> *12. Accordingly, and in the circumstances set out in paragraph 11 above, each and both of BNP and MA, in discharge of their duties as pleaded at paragraph 10 above, 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) them 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.

22 Paragraph 12 is hard to follow but it is clearly intended to allege that a duty of care in tort was owed *inter alia*, by MA towards the plaintiff. I have to say that I see no arguable ground for saying that MA owed such a duty. 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.

23 Again, I asked Mr Cadin whether he had found any case in any jurisdiction which had held that an agent did owe such a duty of care towards beneficiaries or any discussion in a text book which suggested that this was the case. He admitted that he had been unable to do so.

24 He did seek to rely on the case of *Rae v Meek* (1889) 14 App Cases 558. I have to say that I consider this case, far from assisting him, is against him. It involved a claim by beneficiaries against trustees and against the lawyers appointed by the trustees for loss caused to the trust fund as a result of a negligent investment made by the trustees upon the advice of the lawyers. The House of Lords held that the claim against the lawyers failed. Lord Herschell said this at 568:-

> ***"My Lords, at the conclusion of the argument of the learned counsel for the appellants, all your Lordships were of opinion that they had failed to shew any ground for their action against the law agents.*** I share the difficulty

> which was felt by the Lord Ordinary. I cannot see how the law advisers could in any view be held liable to restore to the trust fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all, it can only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And, considering the contingent nature of the appellants' interest in the fund, it is obvious that this must be something very different from the amount lost to the estate. Liability as against the defenders, with whose case I am now dealing, could, in my opinion, only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that, having undertaken this employment, they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees and not to the beneficiaries. If there has been a breach of it, the trustees, and not the beneficiaries are the parties to sue. *There may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, the beneficiaries might compel them to do so, or even enforce the right themselves.* ***But no such question is raised by the averments in the present action……."*** [Emphasis added]

25 As can be seen, the general principle was clearly stated, namely that a claim against an agent appointed by the trustees lies with the trustees and not with the beneficiaries. However, Mr Cadin relied upon the emphasised passage and argued that the House of Lords envisaged the possibility of the beneficiaries bringing a claim themselves against the defaulting agent. In my judgment the emphasised passage is clearly a reference to the two possibilities which I described at para 14 above. Firstly, if a trustee fails to take action against a defaulting agent or delegate who has caused loss to the trust fund, the beneficiaries may institute an administrative action seeking a direction from the Court that the trustee should take proceedings against the agent. As an alternative, in special circumstances, the beneficiaries may institute a derivative action against the agent. However, in a derivative action, the claim is not brought by the beneficiaries as such. The beneficiaries stand in the place of the trustee and sue in right of the trust. They are not enforcing duties owed to the beneficiaries, rather duties owed to the trustee. A beneficiary can be in no better position than trustees carrying out their duties. I do not consider that the passage supports the proposition that beneficiaries have a claim in tort against a defaulting agent for loss to the trust fund.

26 This is not to say that there may not be circumstances in which beneficiaries may have a claim against an agent of a trustee for economic loss suffered by the beneficiaries. Thus, if negligent advice by an agent is relied upon by a beneficiary in circumstances where the agent knows that this may be the case, a claim in accordance with the principles laid down in cases such as *Caparo Industries Plc v Dickman* [1990] 2 AC 605 may arise; and similarly an agent may in some circumstances be held to have assumed responsibility towards the beneficiaries such that a claim arises in accordance with cases such as *Henderson v Merrett Syndicates Limited* [1995] 1 AC 145. (See the discussion to this effect in *Lewin* at paras 43–06 to 43–09). However no such cause of action is pleaded in the present case.

27 Mr Cadin raises the same three arguments as are described in paras 14 to 19 above for submitting that the Court ought to recognise the possibility of a claim in tort by beneficiaries directly against MA as an agent of the trustee. However, for similar reasons to those which I have expressed in relation to the trust claims, I do not consider that any of those three arguments leads me to conclude that it is even arguable that a duty in tort can arise save in these circumstances.

Conclusion

28 For these reasons I allow the appeal, strike out the allegations against MA and discharge MA from the proceedings.

29 By way of postscript, I would make one additional observation on Mr Cadin's point concerning the possible existence of a gap where no remedy would lie against BNP or MA because of the existence of the exoneration provision set out in para 15. The plaintiff's case, as pleaded in the order of justice, is that MA was merely BNP's nominee. Thus, MA could only act upon the instructions of BNP; it had no independent discretion of its own. In these circumstances it seems clear that any action of MA would in law be the responsibility of BNP because BNP would have instructed MA to take the necessary action.

30 Even if, contrary to my view, that there were any doubt about that, I note that the position has been re-affirmed in open correspondence, in that BNP has undertaken that all acts and omissions of MA or any of MA's personnel on MA's behalf connected with the matters in issue in these proceedings shall be treated as BNP's acts and omissions and BNP will be liable for those acts and omissions as principal, so long as such acts and omissions are found by the Court to attract liability. Mr Harvey-Hills specifically confirmed in the hearing before me that this remained the position. It is therefore clear that the plaintiff will suffer no prejudice by the discharge of MA from the proceedings.

31 I emphasise, however, that this is not the reason for discharging MA. I have reached my decision on the simple ground that the order of justice does not disclose a reasonable cause of action against MA.

[2009] JRC 141

ROYAL COURT

(Samedi Division)

Before:

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

In the Matter of Plaintiff'S Application Seeking Leave to Appeal

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

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

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

Authorities

Glazebrook -v- The Housing Committee of the States of Jersey [2002] JLR N 43 .

Glazebrook -v- The Housing Committee of the States of Jersey 2002/217 .

Balmoral Group Ltd -v- Borealis (UK) Ltd [2006] EWHC 2228 (Comm) .

Multiplex Construction (UK) Ltd -v- Honeywell Control Systems (UK) Ltd [2007] EWHC 236 (TCC) .

THE BAILIFF:

1 This is an application by the plaintiff for leave to appeal against the Judgment which I gave on 19 th June, 2009, striking out the plaintiff's claim against the then second defendant Maison Anley Property Nominee Limited on the grounds that it disclosed no reasonable cause of action. No application for leave to appeal was made when judgment was delivered on 19 th June although it had been circulated in draft a couple of days beforehand and it was only on 3 rd July, 2009, that the plaintiff issued a summons seeking leave to appeal.

2 Mr Harvey-Hills takes a preliminary point that I should refuse to hear this application. He refers me to the Practice Direction of the Court of Appeal and in particular paragraph 4.1(a) which says this:-

> " ***Appellants in civil appeals who require leave to appeal must henceforth first make the application to the lower court (ie to the court whose decision is sought to be appealed from), such applications to be made, whenever possible, at the time when the decision of the lower court is delivered, and***

> ***if unsuccessful, any renewal of the application to the Court of Appeal must be made in the first instance to a single judge before being brought before the plenary Court"***

Mr Harvey-Hills argues that the words " ***whenever possible"*** mean that the lower Court should only hear a later application for leave to appeal where it was impossible to make the application at the time the judgment was delivered. I do not interpret it in that way. In my judgment the Royal Court has a discretion as to whether it should hear an application for leave to appeal which is made later than the time of delivery of the judgment. Furthermore this is a Practice Direction not a Rule.

3 Mr Harvey-Hills referred me to two English cases, namely *Balmoral Group Ltd -v- Borealis (UK) Ltd* [2006] EWHC 2228 (Comm), a decision of Mr Justice Clarke, and *Multiplex Construction (UK) Ltd -v- Honeywell Control Systems (UK) Ltd* [2007] EWHC 236 (TCC), a decision of Mr Justice Jackson, from which he sought to draw assistance. But those were cases concerned with the interpretation of a Rule under the English procedures. I do not consider they assist me here.

4 However, the fact that the Court has a discretion does not mean that the Practice Direction can or should be ignored. It is clearly right that applications for leave to appeal should normally be brought at the time the judgment is delivered. This is for good reason. The matter can usually be dealt with very briefly as all parties and the Court will be entirely familiar with the matter and will not need reminding of anything, so it does not add costs. Furthermore, I do not think it is necessary that the advocate who wishes to appeal should necessarily have instructions. In this case Mr Cadin said that he had been unable to contact his client for instructions; but in this context I would refer to paragraph 9 of the decision of the Court of Appeal in *Glazebrook -v- The Housing Committee of the States of Jersey* [2002] JLR N 43 and included in the unreported series at 2002/217. Paragraph 9 of the judgment of Smith J. A. says this:-

> " ***In support of her application for leave to appeal Mrs Glazebrook, in the contentions filed on her behalf, explains that an application was not made at the hearing before the Bailiff because Mrs Glazebrook was not present"… and it was necessary to take further instructions from her to deal with the unforeseen eventuality namely those parts of the Bailiff's decision reflected by paragraph 1 (b) of the Act of Court…" While it is understandable that Mrs Glazebrook's instructions would have been required in order to prosecute an appeal the words quoted do not make it clear why input, or what input, would have been required or expected of her in relation to a leave application which would have committed her to nothing and which would have been based on factors solely within the scope of the expertise of counsel"***.

It was certainly my experience when at the Bar that one would often seek leave to appeal if one thought that there were or might be grounds for it without instructions, on the basis that, as Smith J. A. says, it commits the client to nothing and the client cannot often add anything

to what counsel can say.

5 I repeat that the general practice should be that applications for leave to appeal should be made at the time of delivery of judgment. However the Court has a discretion to hear it later. One of the consequences of hearing it later is that additional costs are likely to be incurred. I have already indicated that the costs of an application for leave to appeal at the time judgment is delivered are minimal if they exist at all. Conversely, for today, each side has prepared a skeleton argument, bundles have been collated and presented to me and we have had a hearing which has lasted in all, together with this judgment, about 1 hour. These were costs which would not have been incurred had the application been made at the time. Accordingly it follows that, if an applicant fails to make the application for leave to appeal at the time that he should, the chances are that the costs of the extra hearing will in any event fall on the applicant, because they will have been incurred solely because of the applicant's failure to apply for leave to appeal at the proper time.

6 I think that is all I wish to say on the question of whether I should hear this application. I consider that, in my discretion, I should not refuse as a matter of principle to hear it despite the failure to apply at the time of delivery of the judgment. I think that any prejudice can be dealt with by way of an order for costs.

7 I turn to the merits. Both parties have reminded me of the test for interlocutory appeals as taken from *Glazebrook*. There are the usual three headings:—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 and 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.

8 I take first the question of whether there is a clear case of something having gone wrong. Mr Cadin argues that there is. I hope I do not do him an injustice if I say that broadly speaking the arguments which he has put in support are much the same arguments as he put before me at the hearing itself. It is always difficult for a judge who has just delivered a judgment to decide whether there is a clear case of something gone wrong, but nevertheless, doing the best I can, I am not convinced that there is an arguable case that there is a clear case of something having gone wrong. Therefore I do not think that ground is made out.

9 As to the questions of general principle and important questions of law, Mr Cadin says that he wishes to argue that the law should be developed in order to provide that an agent of a trustee should owe duties in trust law and/or tort law to the beneficiaries. In my judgment, as I indicated in the decision, the present position is absolutely clear and this is not a developing field. Accordingly I do not think that this falls within categories (ii) or (iii). For those reasons I refuse leave to appeal.

[The Bailiff then heard argument as to costs].

10 I take the view that, insofar as this matter relates to the merits, the costs should fall on the

applicant. As I have indicated, this is a matter which should have been dealt with at the time; so the costs have been incurred solely because of the failure by the applicant to comply with the Practice Direction. A more difficult issue is whether I should make some discount for the fact that part of the preparation and correspondence and part of the hearing was taken up with whether I should refuse to hear the applicant at all because he had not complied with the Practice Direction. On that, I have, whilst endorsing the sentiments argued by Mr Harvey-Hills, decided, in my discretion, to hear it and to that extent have not gone along with his submissions. I consider that it was perfectly proper for him to raise these matters in the light of the applicant's failure to comply with the Practice Direction; so I think in one sense that aspect too did arise out of the applicant's failure to comply with the Practice Direction and make the application for leave to appeal at the correct time.

11 As against that I must reflect the fact that I did ultimately hear the application. Accordingly I am going to order that the applicant should pay 80% of the costs of and incidental to today's hearing on the standard basis.