Yashvina Parujan v Atlantic Western Trustees Ltd

Jurisdiction:	Jersey
Judge:	Southwell JA
Judgment Date:	15 October 2002
Neutral Citation:	[2002] JCA 195
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Court:	Court of Appeal
Date:	15 October 2002

Text

[2002] JCA 195

COURT OF APPEAL

Before:

R.C. Southwell, **Esq., Q.C., Single Judge**

In the Matter of

Between
Yashvina Parujan
Representor/Respondent
and
Atlantic Western Trustees Limited
Respondent/Appellant

Advocate D. F. Le Quesne **for the Respondent/APPELLANT**.

Advocate M. H. D. Taylor **for the Representor/RESPONDENT;**

Authorities.

In re Esteem (2000) JLR N-41 .

Dixon Richardson and ors v Jefferson Seal Limited (1998) JLR 47 C of A .

An appeal by the Respondent/APPELLANT from the Order of the Royal Court of 19th August, 2002, that:

(i) Counsel attend forthwith before the Bailiff's Judicial Secretary with a view to finding two days for trial in November or December 2002.

(ii) Mr. Royan Ellis be convened to appear on that day for cross-examination upon his report by either party.

(iii) The Respondent/APPELLANT prepare and file with the Court an affidavit setting out the matters contained in paragraph (3) of the summons on or before 30th September 2002.

(iv) The Respondent/APPELLANT be at liberty to file another or other affidavits in relation to Mr. Ellis' report or any other matter relevant to the determination of paragraphs (3), (4), (5) of the representation as it sees fit on or before 30th September 2002.

(v) The Representor/RESPONDENT be at liberty to file an affidavit or affidavits in response to any affidavit filed pursuant to paragraphs 3 and 4 above on or before 21st October 2002.

(vi) The Respondent/APPELLANT be at liberty to file an affidavit in response to any matters raised in the affidavit or affidavits filed pursuant to paragraph 5 above on or before 31st October 2002.

(vii) Counsel obtain a date from the Bailiff's Judicial Secretary for a further short directions' hearing in the first week of November 2002 at which time limits for cross-examination and submissions will be ordered, if not already agreed.

Applications by the Respondent/APPELLANT: (1) under Article 13(e) of the Court of Appeal (Jersey) Law, 1961, for leave to appeal (which application had been refused by the Royal Court on 19th August, 2002); and (2) under Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964, for a stay of execution of the Royal Court's Order of 19th August, 2002, pending determination of the appeal.

Southwell JA

1 In this action, the Settlor, Mrs. Yashvina Parujan, seeks the removal of a trustee, Atlantic Western Trustees, Limited, and an account of the fees charged, or purported to be charged, by the trustee. The action is due to be heard in December, 2002.

2 There are some rather surprising features of the case, including, first, the readiness of the trustee, since 1999, to retire, but the failure of the trustee, until now, to give effect to that readiness, and, second, the use by the trustee of trust funds in order to pay the legal costs of resisting this personal claim against the trustee. I anticipate that the relevant monies paid to Viberts will now be restored to the trust.

3 The trustee seeks leave to appeal from a decision of the Royal Court on 19 th August, 2002, laying down some directions leading towards the trial of the action. The application for leave is founded on three alleged errors of the Royal Court in giving those directions.

4 In the ordinary course, the Court of Appeal is most reluctant to interfere with mere procedural directions of the Royal Court. There must be a matter of real substance before the Court of Appeal will be prepared to interfere with such directions; particularly when the Royal Court is seeking to give effect to the spirit and the letter of the Judgment of the Court of Appeal in *In re Esteem Settlement* (2000) JLR N. 41.

5 The first alleged error is that the Royal Court has assumed that the report of an independent expert, appointed with the consent of both parties, as to the appropriateness and the amount of the fees charged by the trustee, is to be treated as binding on the parties. It appears that the Royal Court has given some indications that the expert's report is to be treated as being, to some extent, binding. But I note that the directions of the Royal Court make it clear that the expert is to be available for cross-examination by either party. That being so, it is, in my judgment, clear, that either party may challenge particular points in the report provided – and I emphasize provided – of course that a positive case has already been made out by affidavit. It will be open to the trustee's advocate to cross-examine the expert and thereby to test the correctness or otherwise of the expert's evidence in that way, provided that affidavits have been put in in advance, making clear what are the positive points which the trustee seeks to make in answer to the report.

6 The second alleged error is that the directions of the Royal Court contemplate that the evidence-in-chief of the parties is to be given by affidavit. It seems clear to me that this was contemplated as long ago as the directions given on 8 th January, 2001, which were not appealed against by the trustee, and that, in general, it has been contemplated throughout that the right way to conduct this action, which is primarily for an account of fees, is to concentrate the evidence-in-chief in the affidavits of the parties and the expert, who can then be cross-examined briefly on the real issues between the parties. The notion that issues relating to an account of fees are to be dealt with by lengthy oral evidence-in-chief, leading to an unnecessarily extended hearing, has no place in the courts of Jersey in 2002. The right course is for each witness to be called to confirm her or his affidavit evidence on oath and then to be cross-examined. That is well within the powers of the Royal Court

under its Rules and within its inherent power to regulate the mode of hearing of such a trust matter. In any event, the Royal Court has yet to decide, finally, on the mode of trial, which it will do at a further directions hearing in the first week of November; and it would, therefore, be inappropriate, in any event, for the Court of Appeal to interfere at this stage.

7 The third alleged error is that the Royal Court has indicated that two days are to be set aside for the hearing. It is argued on behalf of the trustee that two days is too short a time for the hearing of this matter. Whether it will prove to be too short or too long or just right will depend both on the further directions yet to be given by the Royal Court and on the real extent of the issues arising at the hearing. It seems to me that one of the principal issues relates to the trustee's attempt to charge its legal costs to the trusts, an issue that is not likely to take any long time to resolve.

8 The trustee's position is that it has failed to put in affidavit evidence, challenging the expert's report. In the absence of any such affidavit making out a positive case for the trustee, it would not be appropriate for the counsel for the trustee to be permitted to challenge the expert's report in cross-examination of the expert. It would be entirely inappropriate, as I conclude, for the Court of Appeal to interfere with the setting of an estimated length of the hearing as the trustee here is seeking to achieve. I emphasize that if the trustee wishes to challenge the evidence which has been set out in the expert's report, then it is for the trustee to put in affidavit evidence which, as I have indicated, it has failed do far to do, and the time for doing so – 30 th September, 2002 — is now well past.

9 In my judgment, this application for leave is misconceived and, sitting as a Single Judge, I refuse leave to appeal. The application for a stay, which is equally misconceived, does not arise.

10 May I finally say that the text of this judgment should be transcribed and should be available to the Royal Court at the further directions hearing in the first week of November.

[There followed submissions from counsel on costs.]

JUDGMENT ON COSTS.

11 Mr Taylor asks for costs to be awarded in favour of his client on an indemnity basis.

> ***"In order to make an order for costs on an indemnity basis there has to be a special or unusual feature of the case."***

I take that from the headnote to *Dixon Richardson and ors v Jefferson Seal Limited* (1998) JLR 47 C of A.

12 There are, to some extent, unusual features in this case, in particular, the fact that, on the

face of the directions, it appears clear that, since the expert is required to appear for cross examination on his report by either party, his report cannot be final and binding on the parties. But, as I have already indicated, if it is to be challenged, the trustee should have taken up the offer, the liberty which was given to the trustee to put in an affidavit challenging that report. The trustee has failed to do so for whatever reason, on advice, and unless it obtains from the Royal Court an extension of time to do so, which no doubt the Royal Court will be reluctant to provide, given the quite clear position under the directions, the trustee may find itself in a position in which it is not able to challenge the expert's report because it has chosen not to put forward any positive case.

13 That is a feature of these proceedings. I think it would be wrong for me to take account in deciding on costs, of either of the points that I made at the beginning of my judgment, including the surprising feature that the trustee was ready to retire in 1999 but that has still not been achieved. I cannot reach a conclusion as to respective fault on that, however strong the indications may be from the papers before me.

14 Equally I think it would be wrong to take account of the fact that apparently Viberts, in relation to the costs of this action, have been paid by the trustee with monies coming from the trust. As I have indicated in my judgment, I anticipate that those monies will be returned to the trust forthwith. But, again, I think that that would not be a matter which I should take into account.

15 Undoubtedly the trustee here has conducted itself foolishly. I am left, at the end of the day, with a strong impression that this is a trustee which has tried to play out the matter as long as possible and has failed to have proper regard to the directions of the Court below. But, weighing all the matters that have been put before me, I come to the conclusion that the appropriate order is that the respondent trustee is to pay the costs of, and occasioned by, this appeal — and in so far as there are any separate costs in the Royal Court, but I doubt if there are any separate costs — on a standard basis to be agreed or taxed and paid forthwith.