# John Dix v Alan Royal

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| **Jurisdiction:** | Jersey |
| **Judge:** | Sir William Bailhache. |
| **Judgment Date:** | 24 December 2021 |
| **Neutral Citation:** | [2021] JRC 326 |
| **Court:** | Royal Court |



**Text**

[2021] JRC 326

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache., **Commissioner, sitting alone**.

Between
John Dix
First Plaintiff
and
Alan Royal
Second Plaintiff
Robert Le Bourgois
Third Plaintiff
Sigma Group Limited
Defendant

**Advocate** M. P. Boothman **for the First Plaintiff**.

**Advocate** I. C. Jones **for the Second and Third Plaintiffs**.

**Advocate** A. D. Hoy **for the Defendant**.

**Authorities**

*Dix v Sigma Group Limited* [2021] JRC 159.

Trusts (Jersey) Law 1984.

Employment.

**THE COMMISSIONER:**

1 On 10th December I sat to give further directions in relation to the ongoing matters in this case. On 28th May this year, the Court delivered judgment, *Dix v Sigma Group Limited* [2021] JRC 159, in relation to the First Plaintiff's claim against the Defendant and left over the assessment of quantum. On 30th June, directions were given by which the Second and Third Plaintiffs were joined to the proceedings. The Defendant was given an extension of time for the payment of £223,320 into Court; the First Plaintiff was to have out of those cleared funds the sum of £63,567.59 on account of his uncontested share of the surplus; and sundry other orders were made for the purposes of dealing with the claims which the Court was advised were to be made in relation to quantum, acquiescence and concurrence.

2 At the directions hearing on 10th December I made the following directions:

> (i) A full transcript of the evidence of the Second Plaintiff at the trial of the action brought by the First Plaintiff against the Defendant should be prepared and circulated to the parties. The costs of the preparation of that transcript would form part of the costs awarded after the hearing on quantum;
>
> (ii) The parties should within seven days attend upon the Bailiff's Judicial Secretary for the purposes of fixing a date for the final hearing of this matter with a time estimate of one day;
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> (iii) The Plaintiffs should have leave to serve and thereafter rely on an updated expert report from Mr David Holmes, such report to be served and filed twenty-one days prior to the date fixed for the final hearing;
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> (iv) Mr Holmes' reports should stand as his evidence in chief and the Defendant would have leave to cross-examine Mr Holmes at the final hearing;

(v) The parties should file an agreed bundle and at the same time exchange and file skeleton arguments seven days prior to the date fixed for the final hearing. The Defendant shall provide to the Plaintiffs all documents that it requires to be included in the bundle fourteen days prior to the date fixed for the final hearing;

(vi) By consent, the sum of £24,949.96 should be paid to the Third Plaintiff out of the sums paid into Court by the Defendant pursuant to earlier orders; and

(vii) Liberty to all parties to apply.

3 I now give my reasons for those decisions.

4 At the final hearing, the Court will have two issues before it, the second of which carrying a number of subsidiary issues. They are:

(i) How much is required to be paid, if anything, by the Defendant as additional compensation for its breaches of trust?

(ii) Which of the parties will share, and in what proportion, the balance paid into Court and any additional sum paid in satisfaction of the Court order under (i) above?

5 As to the first of those questions, the Court's judgment on 28 th May 2021 is to the effect that the Defendant held what has been described as the ‘surplus’ of £223,320.46 on the trusts of the pension scheme, and that by retaining those monies and applying them to the reduction of its overdraft with its bankers, the Defendant acted in breach of trust (see paragraphs 61 and 71 of the judgment). It is to be noted that the Court expressed a number of conclusions in this respect:

(i) There was no obligation on the part of the Defendant as trustees to provide the members with the pension benefits which the scheme envisaged because there was no guarantee of the continuity of benefits. What the Court will be concerned with is the assessment of the quantum of benefit that comes from a closed scheme (see paragraph 67 of that judgment).

(ii) The rules on the closure of the scheme did not provide which of two approaches – the buy out basis or the cash equivalent transfer value basis – ought to be taken in relation to the monies in the scheme on closure. However, the Defendant was acting as trustee and the monies it received were so received on the trusts of the scheme even though the scheme was coming to an end. Accordingly, the trustee had an obligation to apply the monies received as far as it could in securing the benefits which the scheme contemplated (see paragraphs 68 and 69 of the judgment).

(iii) If there were a genuine surplus, all the benefits for the members having being fully paid out, the Defendant, as employer, would be entitled to that surplus. In fact,

because the buy out basis was the correct approach rather than the cash equivalent transfer value, it was (and is) likely that there was no such surplus.

(iv) Further evidence was needed to disclose the extent to which the members of the scheme as at the date of winding up were to share in the total value of the policies, and whether there was in fact any surplus leftover, which seemed unlikely (see paragraph 75).

(v) The exclusion provisions of Rule 18 of the scheme meant that the liability of the Defendant as trustee in providing benefits under the rules was limited to the extent of the trust fund, i.e. the realisation value of the policies. That did not exculpate the Defendant as trustee from any claims for damages for breach of trust as would be justifiable under Article 30 of the Trusts (Jersey) Law 1984 (see paragraphs 80 and 81 of the judgment).

(vi) The prescription claims which the Defendant raised against the First Plaintiff failed.

(vii) Accordingly, the Defendant was liable to apply the surplus in accordance with the rules of the scheme amongst the members at the date of winding up; left over for later determination was the question of such further sum that ought to be paid by the Defendant into the scheme monies for such distribution.

6 I have gone into this analysis of the Court's judgment because I have been shown a draft expert report dated 14 th September 2021 from Mr David Holmes. In it he makes a set of three different calculations. The first allocates the surplus of £223,320.46 amongst the three Plaintiffs. As between the three of them, that allocation has been agreed and the First Plaintiff has already been paid his allocation of £63,567.59. In the light of that agreement, and with the consent of the Defendant, the Third Defendant is entitled to be paid his allocation of the surplus in the sum £24,949.96, and that order was made at the directions hearing.

7 The second set of calculations made by Mr Holmes took as a starting point the pension which the First Plaintiff would be entitled to receive following his sixtieth birthday in 2012, had the scheme not closed. Mr Holmes assessed what income might have been available from the cash equivalent transfer value, noting that that sum fell short of his scheme pension entitlement; and, accordingly, assessed the sum of money due by way of compensation for the difference between the full pension due in 2012 if the scheme had continued and the amount which could reasonably have been obtained from the cash equivalent transfer value.

8 Obviously for the purposes of a directions hearing, and not having had the benefit of any further evidence from Mr Holmes or full argument, I have reached no final conclusions on this approach, but it is right to say at this stage that the Court will want to be addressed at the final hearing on why this approach is the appropriate one to take given that the scheme itself did not guarantee, in the event of early closure, payment of the full pension to each

member of the scheme. If the scheme policies were insufficient to pay those full pensions, the exclusion provisions of Rule 18 provided the Defendant with a defence against such claims (see paragraph 81 of the judgment). The Court will therefore need to be addressed on why it is that the breach of trust which led the Defendant into keeping for itself what I have described as the surplus, should expose it to claims for damage which would appear to compensate the First Plaintiff to a greater degree than his entitlement had the breach of trust not occurred.

9 The third part of Mr Holmes' report reaches a different conclusion from the first section which addressed simple interest on the surplus at Bank of England base rate plus 2% and instead recalculated interest on the surplus using rates which would be in line with the rate of interest which the Defendant would otherwise have incurred on its overdraft had the surplus not been returned to it. The interest was also applied on a compound basis and not as simple interest. The reason for this section of the report appears to be grounded in the principle that a trustee is not permitted to benefit from his trust, and thus should account to the trust for any benefit so obtained.

10 It might be thought that if the right basis of assessment of compensation to the trust fund is an interest calculation, then it would seem likely that the interest lost to the fund by the monies being paid to the Defendant would probably be less than the benefit gained by the Defendant from the monies being applied against its overdraft, on the basis that overdraft rates of interest are generally higher than deposit rates of interest. It was suggested to me by Advocate Hoy that the calculation would prove to be a difficult one in the sense that the Defendant's bank balances fluctuated after the surplus funds were received, sometimes being in debit and sometimes being in credit, and thus it was difficult to come up with an exact figure not least because the relevant documents were no longer available, that surplus having been credited in or about 2008. Indeed, in his most recent report, Mr Holmes indicates that the information provided to him did not appear to be complete and he has had to make some assumptions on relevant interest rate changes and timing.

11 This seems to me to give rise to two immediate considerations. The first is that at the final hearing it would seem prima facie incorrect for either Mr Holmes or the Plaintiffs to be faced with any form of detailed calculation which suggests a period over which there was no benefit to the Defendant in the sense of overdraft interest not being paid because the company's account was in credit. The second is that in any event this would seem – and again I emphasise I have not been addressed on these points in detail or seen the authorities and am expressing no more than a provisional view as to what the Court will need to be addressed on – a calculation of dubious value. As at present advised, I would be of the view that if the trustee has to account for interest lost to the fund, that figure would normally be the same figure, whether invested by the members or by the Defendant as the trustee in breach. This would seem to indicate that in terms of equitable compensation, it would not matter whether the Defendant's account was in surplus or not because the loss to the fund would be the same whether the surplus had been invested by the Plaintiffs or the Defendant. The only qualification in principle to that statement would appear to arise out of the rule that a trustee must not benefit from his breach of trust, and accordingly if in any

particular period the reduced interest on overdraft exceeded the interest that would have been lost to the fund had it been invested, the higher of the two figures would appear to be the correct one to take.

12 Given that all the documents which may be necessary to establish what the reduced overdraft interest figure was for the relevant periods, it may turn out to be necessary to apply a broad brush to this calculation. Once again, the comments are made to enable the parties at trial to address what, as I see it, the Court is likely to want to see argued out.

13 At one point in his submissions, I understood Advocate Hoy – perhaps wrongly understood him – to be asserting that, because the Defendant's bank account was not always in overdraft, there might be no interest payable because the Defendant had not benefitted in any sense from receiving the surplus. As at present advised, if that were the submission, the result would seem counterintuitive to the provisions of Article 30(2) of the Trusts (Jersey) Law 1984, which do not focus upon the benefit the trustee in breach might have received but rather upon the proper compensation to the trust fund as a result of the breach. Subject to further argument, I would be inclined to the view that, other than also removing from a trustee the benefit to it of its breach of trust, the loss of interest to the fund would be the appropriate test.

14 It may also be relevant to note that apart from the question as to what, if any, interest is to be paid by the Defendant into the trust fund, there is an issue as to whether it should be calculated on a simple or compound basis. The overall difference between the two calculations, including a difference between overdraft rates and Bank of England base rate plus 2%, is some £50,000 on Mr Holmes' calculation. Although that is a significant sum of money, it needs to be viewed in the context of the cost of these parties arguing the issue out at trial. The parties may consider that what is involved at that point absolutely demands a sensible compromise.

15 I now turn to the second question which is who shares in the scheme monies and in what proportions. It appears from what I have heard from the parties that, assuming each of the Plaintiffs is entitled to share, there is no dispute between the Plaintiffs and the Defendant or between the Plaintiffs amongst themselves as to the proportions in which the scheme monies come to be shared. The only issue therefore appears to be whether the Second Plaintiff is entitled to a share in the scheme monies and in that context the rival contentions appear to be these:

(i) The Defendant asserts that the Second Plaintiff has concurred or acquiesced in the Defendant's breach of trust and/or has delayed in making any claim for breach of trust such that he is not entitled to participate in any further distribution of the scheme monies. In those circumstances it is said by the Defendant that the surplus monies should be paid to it.

(ii) The Defendant does not make these claims against the Third Plaintiff which is why

it has been agreed that an immediate payment can be made to him of his share of what we have described as the surplus from the monies held in Court.

(iii) By contrast, the Second Plaintiff says these claims of the Defendant are chose *jugée*. He asserts that the Court has already resolved that the monies are to be applied amongst the members entitled at the time.

(iv) The First Plaintiff's position is that if the Second Plaintiff is not entitled to participate in a distribution of the scheme monies, then the First Plaintiff should have his full reinstatement value before any monies are returned to the Defendant.

16 It has been accepted at the directions hearing that no further evidence should be necessary on the claims in relation to acquiescence, concurrence and delay. The evidence which will be before the Court is the documentary evidence before the Court at trial at the first hearing, and the evidence of the Second Plaintiff, a transcript of which has been ordered. The Court will also have the benefit, of course, of its earlier judgment. On the strength of these documents, the Court at the next hearing will be invited to make findings as to whether the Defendant is barred from bringing these objections on the grounds of chose *jugée*, and if not barred whether they have any foundation in law or on the facts.

17 I do not begin to anticipate the nature of the arguments that might be run in this connection but it is right to recall that in his closing address prior to the judgment delivered on 28 th May, Advocate Hoy did draw the Court's attention to the fact that the breach of trust, if that were the conclusion, would result in a payment by the Defendant into the scheme and not directly to the First Plaintiff and thus the Court had to be careful that further claimants would not come to court later with the result that the First Plaintiff had been overpaid. Indeed, I can indicate that it was with that in mind that the first sentence of paragraph 89 of the judgment handed down on 28 th May was drawn in the way that it was and why the Court subsequently gave directions that the Second and Third Plaintiffs be notified of the judgment so that they could determine whether they wished to apply to join the proceedings. The Defendant will also want to consider whether, even if it were to be successful in resisting any participation by the Second Plaintiff, trust monies would be returned to the employer under the scheme in circumstances where other members, namely the First and Third Plaintiffs, had not received all the monies to which they were entitled under the scheme at the time. Clearly I do not have available to me the figures which would enable an assessment to be made of the relative merits of the argument in that respect and it is mentioned in the present judgment as material for consideration by the parties.

18 Having noted the provisions of paragraph 18 of the Defendant's Answer, my present view is that at the next hearing the Court will want to be addressed on whether the evidence that the Defendant voted against the proposed retention of the surplus monies is a relevant feature of his alleged acquiescence and concurrence in what was done, and likewise whether his conduct immediately after that decision was taken in contacting first of all Messrs Rossborough and, secondly, Mr Sillars with a view to suggesting another way forward also falls to be taken into account. The Defendant will no doubt be asked to

address the Court also on whether the evidence, uncontested as far as I recall, that the Second Plaintiff considered that the Defendant was legally entitled to do what it did, albeit not morally so entitled, amounts to a sufficiently full knowledge of the facts as to be capable of justifying the application of the doctrine of acquiescence to him. These are practical matters on which it is right that I indicate the parties will need to address the Court at a later stage.

19 Finally in that connection, Advocate Hoy made the point that to the extent that there is any distribution of the surplus and other monies paid into the scheme by the Defendant which does not exactly fit the terms of the trust, the Defendant will need to have an express Court order approving any such distribution. I would respectfully endorse that remark, although I see no reason why, if a consent order is prepared for consideration, the Court as presently constituted cannot deal also with an approval of the proposed distribution, all the members of the scheme and the employer being before the court.

20 Although many matters of law will be addressed at the final hearing, the Court will sit if possible as constituted for the hearing that took place earlier this year leading to the judgment on 28 th May. It is currently unclear what issues of fact will need to be resolved by the Jurats, but there will be an exercise of judicial discretion required in which one would expect the Jurats to participate.