

JERSEY / JUDGMENT

1999/173A - Eves v Troy [1999]

UR 173A (13 October 1999)

[1999] UR 173A

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JUDGMENT

THE DEPUTY BAILIFF: On 21 September, Mr & Mrs Eves - as plaintiffs - issued two summons against Advocates Troy and Fielding peremptorily summoning them to appear before Court today.

The aim behind the summons is that they should give evidence at the hearing of the application to strike out the Plaintiff's Order of Justice, and that is fixed for next Thursday. Advocate Lawrence appeared for Advocates Troy and Fielding. Advocate Begg appeared for Mr David Brown, the third defendant. We have not seen the summons that Mr & Mrs Eves issued against Mr Brown, but we presume that it is in identical form, otherwise Advocate Begg would have had no reason to appear before us today.

It is of some concern that the affidavits of Advocates Troy and Fielding were made on 6 October, after the summons had issued. Mr Brown has not made an affidavit at all.

A detailed letter was sent by Advocate Lawrence to Mr & Mrs Eves on 5 October. It stated succinctly all the points that Advocate Lawrence enlarged upon, with great lucidity, before us this morning. We would extract just one sentence from that letter:

"It cannot be emphasised too strongly that you would not be given an opportunity to ask general questions outside the scope of the affidavit and the strike out hearing"

Draft affidavits were filed; no response was received. The case of Arya Holdings Limited -v- Minorities Finance Limited, (31 October 1991) Jersey Unreported. [1991] JLR N2 is important for the purposes of this hearing. We can extract the relevant extracts from the case in this way:

"Order 38 rule 1 (at page 620 of the White Book, as does rule 6/18 of the Royal Court Rules, 1982), provides that at the trial of any action by the evidence of witnesses any fact shall be proved by the examination of the witnesses orally and in open Court. Rule 6/18(1) contains the following:"

And then the Rule goes on to explain what it says, which is in similar form, and then:

"However this Rule only refers to evidence at "the hearing of any action" i.e. at the trial; it refers to a general rule of the law of evidence, but it is of limited application. Paragraph 38/1/1 of White Book says that: "It does not apply to any motion, petition, or summons, or any other proceedings except an action commenced by writ, and it does not apply to any interlocutory proceedings in such an action but only to the trial..."

Again, referring to Order 38 rule 2/3:

"In any cause or matter, and on any application made by summons or motion, evidence may be given by affidavit, unless in the case of any such cause, matter, or application, any provision of these rules otherwise provides, or the Court otherwise directs. but the Court may, on the application of any party, order the attendance for cross- examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, these affidavits shall not be used as evidence without the leave of the Court."

And again:

"

In practice, cross-examination does not often take place on interlocutory applications.
(Halsbury's Laws of England, 4

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edition, volume 17, p.216, para 311). However footnote 2 to that paragraph states that - In interlocutory proceedings, where there is a genuine application to cross-examine a deponent on his affidavit, that application should normally be granted. Comet Products U. K. Ltd -v- Hawkex Plastics Ltd (1971) 2 Q. B. 67 at 76, (1971) 1 All E. R. 1141 at 1146 C. A. per Megaw. L. J. We have examined the report of the case but the note is sufficient for our purposes. Nevertheless we note that at p.76 Megaw. L. J. uses the term "bone fide application" rather than "genuine application". We too prefer "bone fide application". And that at page 77 Cross L. J. went rather further and said:

"It is, I think, only in a very exceptional case, that a Judge ought to refuse an application to cross-examination a deponent on his affidavit. Therefore though in practice cross-examination does not often take place on affidavits used in interlocutory applications, if we are satisfied that the plaintiffs application is bone fide, it would normally be granted."

There can be no

bona fide

application if the affidavits were not even in existence when the summons was issued. Despite that serious anomaly, we have decided in the interests of justice and as Mr & Mrs Eves continue to represent themselves, to hear this matter to its conclusion.

It is readily apparent that the facts in this case are not on all fours with the facts of Arya. It does not in our view, even remotely approach the factual context in Arya. As was said in that case:

"Mr Michel does not ascribe to Mr Harper any criminal intent or dishonesty, but claims that the affidavit is misleading. He alleges areas of non-disclosure, he claims that the affidavit gave rise to very grave doubts as to the deponents veracity; that there has been a lack of open handedness with the Court on the deponent's part, and there are important matters to "discuss" with him in cross-examination. According to Mr Michel there has been either a conscious decision to conceal matters from the Court or a cavalier disregard of duties to the Court. Accordingly Mr Michel seeks to rely on re: Smith and Fawcett above, because he claims that there is a question of motive or of good faith of the deponent, in which case the Court ought not to be asked to act upon the striking-out applications without cross-examination. The relevant passage in re: Smith and Fawcett is at page 545 of the report. Lord Greene M. R. said this: "Speaking for myself I strongly dislike being asked, on affidavit evidence alone, to draw inferences as to the bone fides or mala fides of the actors. In the present case the principle director has sworn an affidavit which, if accepted, makes it clear that whether rightly or wrongly, the directors have, bone fide, considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares. We are invited to say that it does not represent the fact, and that the real motive which influenced the deponent was not a consideration for the interest of the company, but a consideration of his own personal interests. I for one, except in a clear case, am strongly opposed to drawing an inference of that kind from mere affidavit evidence. If it is desired to charge a deponent with having given an account of his motives and his reason which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross examination."

The content of the affidavits of both advocates is incontrovertible fact. Advocate Fielding says in his affidavit that he was an employee of Advocate Troy at the relevant time, and therefore is wrongly named in law as a defendant. Mr & Mrs Eves, in my view, quite correctly, withdrew their submissions against Advocate Fielding.

As for Advocate Troy, he again makes statements in his short affidavit which are incontrovertible, particularly about the dates, and his filed accounts. But those accounts fall within the clear exception set out in 4 Halsbury 17: para 311; and that extract says at paragraph 5:

"Cross-examination will not generally be ordered on an affidavit of documents, or a merely formal affidavit."

There is no question of good faith or the merits of the allegation, and again, I apprehend, quite correctly, Mr & Mrs Eves in open Court withdrew their summons against Advocate Troy.

As to Mr David Brown, we have not seen his summons but it must be there otherwise Advocate Begg would have had no reason to be in Court. The affidavit is that of Advocate Begg, and he has worked his way through the 22 pages of this affidavit with us. All his points are points of law, which will be made at the striking out application. We have not, and of course we will not, enter into the merits of the case, but his affidavit is stated to be in support of an application to strike out the Order of Justice and/or the reply.

That took us a little more time, but there is nothing there that can possibly be subject to cross-examination. And in any event Advocate Begg is not a party, but says in his affidavit:

"Rather than the third defendant, I am swearing this affidavit since it raises technical legal issues which the third defendant could not be expected to know".

Whether that should or should not have been made in that form, is certainly not for us today.

These preliminary summons of Mr & Mrs Eves in our view are devoid of merit or substance. They will be struck out, and we so order.

Authorities

Arya Holdings -v- Minories Finance (31 October, 1991) Jersey Unreported [1991] JLR N.2.

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