

JERSEY / JUDGMENT

Robertson v Slous [2000]

JRC 130A (12 July 2000)

[2000] JRC 130A

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JUDGMENT

THE GREFFIER SUBSTITUTE: 1. By an Order of Justice dated 5 th November 1999 and served on 19 th November 1999 the plaintiffs seek damages/restitution from the defendant. The principal allegation against the defendant is that in breach of his fiduciary duty he diverted funds from the company Thermal Transfer Services Limited for his own benefit. 2. On 2 nd May, 2000, the defendant issued a summons seeking to strike out the Order of Justice pursuant to Rule 6/13 of the Royal Court Rules 1992. The summons came before me on 8 th June when I granted the defendant's application. I now set out my reasons for that decision. 3. At the hearing before me on 8 th June it was agreed between the parties that the application to strike out would be solely on the ground specified in Rule 6/13(1)(a) of the Royal Court Rules 1992, namely that the Order of Justice disclosed no reasonable cause of action. It was also accepted by Advocate Pearmain that even if the action were to proceed, Thermal Transfer Services Limited should be a second defendant and not a second plaintiff as is presently the case. 4. Essentially, the Order of Justice seeks relief on two bases. Firstly, there is what has been described as a personal claim by the first plaintiff against the defendant. In particular, in paragraph 17(c) of the Order of Justice it is alleged that the defendant owed a duty to the first plaintiff as an individual by virtue of the first plaintiff being a 50% shareholder in the company Thermal Transfer Services Limited. Paragraph 18 of the Order of Justice then goes on to allege a breach of that duty by the defendant in procuring the transfer of funds from the company. At the hearing before me Advocate Pearmain stated that on reflection the Order of Justice should be amended so as to claim in this regard breach of the agreement as referred to in paragraph nine of the Order of Justice. No application to amend the Order of Justice was before me and I did not, therefore, consider any application so to amend. 5. The second element of the claim in the Order of Justice is as a derivative action brought on behalf of Thermal Transfer Services Limited against the defendant. Such an action would have to be on the basis of an exception to the rule in *Foss -v- Harbottle*

(1843) 2 Hare 461 that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is *prima facie* to the company itself. Advocate Pearmain conceded that even if the first plaintiff were to bring the action in his own name then the company should be joined as a defendant and not, as is presently the case, as a second plaintiff. 6. The dispute between the parties has already been the subject of litigation before the Royal Court.

Previous proceedings were brought by the first plaintiff against the defendant which led, on 23 rd January 1995, to the Royal Court deciding that the plaintiff was entitled to a 50% share in the company. The plaintiff subsequently brought an action against the defendant seeking a share of the company's profits. That claim was struck out by Advocate B. I. Le Marquand acting as Greffier Substitute on 3 rd February 1998 as disclosing no course of action [John Robertson v Gerard Henry Slous (3 rd February, 1998) Jersey Unreported]. 7. Advocate Grace, in support of the striking out application, took issue with both the personal and derivative claim aspects of the Order of Justice. 8. In relation to the personal claim by the first plaintiff against the defendant, Advocate Grace submitted that paragraph 17(c) of the Order of Justice first raised the duty allegedly owed to the first plaintiff by the defendant and a breach of that duty is pleaded in paragraph 18 of the Order of Justice. He also referred me to paragraph 22 of the Order of Justice which refers to the first plaintiff having suffered loss as a shareholder by reason of the matters pleaded in paragraph 17 which constituted breaches of the fiduciary duty owed by the defendant to the first plaintiffs as pleaded in paragraph 17(c). He also referred me to paragraph 23 of the Order of Justice which claims that the first plaintiff has suffered a loss by reason of the breaches of the implied terms of the agreement pleaded in paragraph 9. He points out, however, that no such breach is pleaded in the body of the Order of Justice, nor are any particulars given. Advocate Pearmain, on behalf of the first plaintiff, conceded this point and accepted that even if the action were to proceed the Order of Justice would need amendment. 9. The second aspect of the plaintiff's claim is the so-called "derivative" action. The plaintiff claims that he can bring this action in his own name as an exception to the rule in *Foss -v- Harbottle* rather than the action needing to be brought in the name of the company itself. 10. In my view, the two claims are inextricably linked and in reality are one and the same. In this regard, I have noted the provision of paragraph 24 of the Order of Justice which states that the loss suffered by the first plaintiff as a result of those matters pleaded in paragraph 17 of the Order of Justice is a 50% share of the accumulated profits which ought to have been reported and available for distribution to shareholders. In such circumstances the legal position is, I think, quite clear and is summarised by Advocate Le Marquand in his judgment of 3 rd February 1998 where he says:- "However, what is clear is that the rights of a shareholder to a distribution of the assets of the company are rights against the company and if another shareholder has wrongly caused assets to be removed from the company then it is the company which should be claiming against that person. In appropriate circumstances, such a claim may be brought by a minority shareholder's action if no other remedy is available. The plaintiff cannot simply short circuit things by directly suing the defendant." I conclude that the personal claim is misconceived and cannot succeed. 11. I now turn to consider the claim in the so-called "derivative" action. 12. The relevant principles applicable are set out by the English Court of Appeal in the judgment of *Barrett -v- Duckett and Others*

(1995) 1 BCLC 243. Those principles are stated at pages 249 and 250 as follows:- "The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:

1. The proper plaintiff is prima facie the company.
2. Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.
3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.
4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
6. The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company or wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed." 13. The rule in *Foss -v- Harbottle* and the principles stated in the *Barrett* case seem to have been accepted by the Royal Court. See, for example, the case of *Floor Khan and Another -v- Leisure Enterprises (Jersey) Limited* (Jersey Unreported 18 th December 1997) and the decisions of Advocate Le Marquand as Greffier Substitute and the Royal Court in *Gamlestaden Fastigheter AB -v- David Paul Boleat and Others* (Jersey Unreported 23 rd February, 1998 and 1 st July, 1998 respectively). 14. In the present case the principle set out in the *Barrett* case which is relevant is number 6 which, I repeat, is in the following terms:- "6. The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed." 15. Advocate Grace submitted that in the present case there were other remedies available to the first plaintiff. In particular, he drew my attention to the "unfair prejudice" provisions in part XX of the Companies (Jersey) Law 1991 , Articles 141-143, and those relating to the winding up of a company on just and equitable grounds in Article 155 of the same Law. 16. Advocate Pearmain, on behalf of the first plaintiff, argued that as was shown in the Order of Justice, his client had both a personal and a derivative claim. To sever these claims would effectively mean that two sets of proceedings would have to be instituted leading to an

unnecessary duplication of costs. He argued that the rights of the first plaintiff to bring a derivative action had not been removed merely because there were possible remedies under Article 141 or 155 of the Companies (Jersey) Law 1991 . He submitted that the plaintiff could look both to the customary law and to statute for his remedies. 17. Advocate Pearmain also submitted that the "personal" claim by the first defendant was for breach of contract and was a sustainable cause of action on its face and should not be struck out. He conceded, as previously mentioned, that the Order of Justice would need to be amended if the action were to proceed. 18. Mr Pearmain also argued that effectively the relationship between the plaintiff and the first defendant was one of quasi-partnership. No other parties were involved and there were no independent third party minority shareholders. In those circumstances he urged that the proper way to proceed was in the manner in which the proceedings were framed and justice required that the first plaintiff had an opportunity to have his case considered by the Royal Court. 19. My conclusion is that the two aspects of the first plaintiff's claim, namely the "personal" claim and the "derivative" claim are inextricably woven and it would not be right or proper to distinguish between them. Furthermore, I conclude that the derivative action is one which would be properly brought by the company itself. It does not come within any exceptions to the Foss -v- Harbottle rule and, furthermore, there are alternative remedies available. 20. In those circumstances, I granted the application of the defendant and ordered that the Order of Justice be struck out. I also ordered that the costs incurred by the defendant in the action should be paid by the plaintiff on the standard basis. Authorities John Robertson -v- Gerald Henry Slous (3 rd February, 1998) Jersey Unreported. Floor Khan and Another -v- Leisure Enterprises (Jersey) Limited (18 th December,

1997) Jersey Unreported. Gamlestaden Fastigheter AB -v- David Peter Boleat and Others (23 rd February, 1998 and 1 st July, 1998) Jersey Unreported. Royal Court Rules 1992 as amended: Rule 6/13. Companies Law (Jersey) Law 1991 Articles 141-143 and 155. Foss -v- Harbottle

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