

Chvetsov v BNP Paribas and Another [2009] JCA220

Facts

The case concerned an application for leave to appeal against a decision in the Royal Court striking out a claim against Maison Anley Property Nominee Limited ("MA"). The conclusion arrived at by the Royal Court was upheld, that being the claim contained no cause of action.

"So long as the statement of claim or the particulars disclose some cause of action, or raise some questions 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 out. This is particularly so in an uncertain and developing area of law."

Background

Oleg Chvetsov (the "**Plaintiff**"), as settlor, established a Jersey discretionary trust, of which he was also one of the beneficiaries. The trustee in this case (the "**Trustee**") was the sole trustee of the trust, and held through MA (its nominee) a North London property (the "**Property**") occupied by the Plaintiff and his family.

The Plaintiff requested and the Trustee agreed to renovations at the Property, and the Trustee authorised MA to enter into a contract with a firm of architects to design and supervise the renovations. The claim put forward originally by the Plaintiff was against both the Trustee and MA, alleging that both parties had failed in monitoring and controlling the project which led to excessive cost, over payment of a contractor, irrecoverable legal costs and costs of adjudication proceedings against other parties involved in the renovation. The remedy sought was reconstitution of the trust fund.

This application was only in respect of the claims against MA, and specifically whether there was a reasonable cause of action against it. The Plaintiff's claim against MA was twofold, firstly, as the Trustee's nominee, MA owed certain duties in its management of the Property (that being to act with due diligence, care and skill, and to the best of its ability pursuant to the Trusts (Jersey) Law 1984) (herein referred to as the "**Trust Claim**").

Additionally, MA was under a duty of care to the Plaintiff in tort not to cause damage to him, as both the Trustee and MA were aware of the Plaintiff's total reliance on the Trustee for all matters connected to the Trust (herein referred to as the "**Tort Claim**").

Test for cause of action

In considering the merits of the application the Court cited *In Re Esteem Settlement [2000] JLR 119* which sets out the test as to whether a reasonable cause of action exists or should be struck out, and makes reference to paragraph 18/19/10 of the 1 Supreme Court Practice 1999, at 349:

Grounds for appeal

The Plaintiff argued that as MA was appointed solely for the Trustee's convenience and there was commonality of personnel between the Trustee and MA, in addition to there being duties set out in the trust documents. The Royal Court had been mistaken in holding that MA owed no duties to the beneficiaries equivalent to those owed by the Trustee, and that MA owed no duties in tort to the beneficiaries, as the Royal Court said, such duties could never be owed to the beneficiaries by MA.

It was also alleged that the Royal Court had erred in deciding that there could never be a gap between liabilities of a trustee and its delegate such that the beneficiaries would be left without recourse and that even if such an event were to occur, the beneficiaries ought to pursue the trustee in asserting claims against a delegate.

The Plaintiff also asserted that as a matter of public policy additional hurdles ought not be placed before beneficiaries seeking such claims, and agents duly appointed by trustees should owe duties directly to the beneficiaries.

Decision

The Trust Claim was considered a novel proposition and as such had no authority to support it. The court concluded that the use by trustees of agents was not a recent occurrence, and had there been reason to subject agents to duties owed by trustees it would have arisen previously. The argument of commonality of personnel and the Trustee's control of MA was also rejected, as the court held that "if the engagement of agents by trustees is permissible and does not impose on those engaged the duties owed by trustees we cannot see how the factors referred to could, of themselves, possibly have the effect of imposing them". An analogy between MA and an employee of the trustee was put forward, the conclusion drawn that an employee of the Trustee's would not have these duties imposed upon them.

With regards to the Tort Claim, the court explained that the Plaintiff would have to establish that he relied on negligent advice provided by MA, with MA knowing this was the case, or there would have to be facts inferred



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from which that MA had assumed responsibility for the beneficiaries. These facts could not be established in pleadings or particulars in this matter. Additionally, the remedy sought was reconstitution and not damages for loss sustained, which, prima facie, failed to establish the third limb of any tort claim, being damages.

Both claims were therefore rejected and leave to appeal denied.

Comment

The Court of Appeal endorsed the Royal Court's common sense approach to the liability of agents, who are effectively one and the same as the trustee.

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