Judgment 27/2008 **Dronne Investments Ltd v HSBC Private Bank (Guernsey) Ltd – Royal Court (Civil Action File 1165) – 9 June 2008**

Civil procedure – Exception de fonds – defence of prescription – replique alleging empêchement d'agir – proper approach to considering exception de fonds – exception rejected

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1165

The 9th day of June, 2008 before Sir de Vic Carey, Lieutenant Bailiff , sitting alone.

Between:

DRONNE INVESTMENTS LIMITED
(Plaintiff)

v

HSBC PRIVATE BANK (GUERNSEY) LIMITED
(Defendant)

On the application of the Defendant, dated the 29th November, 2007, in the terms attached hereto;

WHEREAS, on the 21st day of May, 2008, THE COURT, having heard Advocates C.A. Tee and J.T. Le Tissier, Counsel for the Plaintiff and Defendant respectively, RESERVED JUDGMENT;

THE COURT this day DELIVERED Judgment in the terms attached hereto, REJECTED the Exception, and RESERVED costs.

M A TOSTEVIN
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

In the matter of an Application

Between

DRONNE INVESTMENTS LIMITED **Plaintiff**

-V-

HSBC PRIVATE BANK (GUERNSEY) LIMITED **Defendant**

Judgment of Lieutenant Bailiff Carey on exception de fonds dated 16th November 2007

Date of hearing: **21st May 2008**
Judgment delivered: **5th June 2008**

Counsel for the Plaintiff: **Advocate C A Tee**
Counsel for the Defendant: **Advocate J T Le Tissier**

Cases: -
Cherub Investments Limited v Channel Islands Aero Club Guernsey Limited 1982 Civil Appeal No. 11
Vaudin v Hamon [1974] AC 569
Public Services v Maynard [1996] JLR 343
Boyd v Pickersgill [1999] JLR 286
Holdright Insurance Company Limited v Willis Corroon 25th August 2000 [29 GLJ 40]
Yaddehige v Credit Suisse Trust and others 2007 - 08 GLR p.282

Texts: -
Laurent Carey

JUDGMENT

1. Advocate Le Tissier, on behalf of the Defendant has filed an Exception to the effect that the claims in the Plaintiff's Cause are prescribed in that they have accrued before the 8th October 2001, the Plaintiff's action not having been commenced until the 8th October 2007.

2. To this Exception, Advocate Tee filed a Replique to the effect that time did not run against the Plaintiff and that it was *empêchée d'agir* until it learned on 9th October 2001 that the Defendant had not carried out the Plaintiff's instructions to sell its investment in the funds, the subject of this claim and that it would not honour an earlier representation alleged to have been given that the Defendant would indemnify the Plaintiff for any loss through a decline in value of the fund since the date of the Plaintiff's original instruction (to sell) in October 2000.

The Plaintiff's Pleaded Case

3. In 1997 the Plaintiff opened an account with the Defendant in its former guise as Bank of Bermuda Guernsey Limited and appointed the Defendant as Banker and Investment Manager. On 3rd September 1997, the Plaintiff through a Mr Summers,

who is described as one of its beneficial owners, directed the Defendant to invest $600,000, previously deposited in the company's bank account, in a fund originally called Global Manager Tactical Growth Fund and subsequently called All Points Index Funds Tactical Growth Fund.

4. In October 2000 it is alleged that Mr Summers phoned a Mr Falla of the Defendant bank, asking that the holding in the fund be sold and the proceeds re-invested in other funds. Falla is alleged to have agreed to the instruction and that the proceeds would be placed in the Defendants Money Market Fund, pending the outcome of a meeting to be held in London to discuss appropriate places to invest the proceeds in the long term. Mr Summers saw from his monthly statement from the Defendant that the holding had not been sold and spoke again to Mr Falla in December. Mr Falla is alleged to have acknowledged his oversight and stated he would carry out the sale forthwith.

5. In January 2001, Mr Summers telephoned a Ms Stopher of the Defendant bank. She told him that Mr Falla had left his post with the Defendant, but she did not know why the instructions about which she had not heard, had not been actioned. She went on to tell Mr Summers that there was no need for concern as there has been no change in the value of the fund and an investment meeting would be arranged shortly. It was then alleged that she then went on to make a representation on behalf of the Defendant that should there be any loss incurred by the Plaintiff by virtue of the value of the fund decreasing between the date of the original instruction in October 2000 and the date of the sale of the Plaintiff's investment in the fund, the Defendant would indemnify the Plaintiff for any such loss. Mr Summers acted in reliance on this and took no further action to progress the sale or make enquiries about the investment in the fund.

6. In July 2001, Mr Summers made enquiries as to the progress being made to setting up the investment meeting. During the course of August 2001, the value of the fund began to fall and Mr Summers again telephoned Ms Stopher to enquire about the investment meeting. The investment meeting eventually took place on the 9th October 2001. Again the investment had not been sold. Mr Fairbourne, who attended the meeting with Ms Stopher, advised that, contrary to what had been said by Ms Stopher, the Defendant would not indemnify the Plaintiff for the loss incurred by the virtue of the value of the fund decreasing since the original instruction to sell was given in October 2000.

7. The Plaintiff therefore is claiming damages, which are calculated as being the difference in value of the investments of the day on which it says it gave instructions for the sale of the shares, and the value of the shares on 9th October 2001.

The Applicable Law

8. I repeat the words of Hoffman J A as he then was in *Cherub Investments Limited v Channel Islands Aero Club Guernsey Limited 1982 Civil Appeal No. 11*:-

> *"Now it seems to us that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistent with the pleadings which could be proved at the trial – which would allow the Plaintiff to succeed in the action …"*

9. I have to accept the pleadings as they are and in order to uphold the exception de fonds I must be satisfied that from the pleadings as drawn there is no possible issue over whether or not the Plaintiff's claim is prescribed.

10. Both parties accept that the prescription period in a case such as this is six years, whether the claim is brought in contract or in tort, it is also accepted that six years is calculated back from the date the summons was issued and here for some reason, not explained to me and which may or may not be relevant at trial, if this matter goes to trial, Advocate Tee had her summons served precisely 6 years after the meeting with Mr Fairbourne, at which the Plaintiff was disabused of any suggestion that the Defendant had through Ms Stopher agreed that it would indemnify it against any losses it had suffered from the failure to act upon the original instruction to sell the shares.

11. There is no disagreement between the parties that in the normal way, both in contract and tort, the Cause of Action would have arisen at the time that the bank either, in breach of contract or in breach of its duty of care to the Plaintiff, failed to honour the instruction given to it by Mr Summers. The point over which the parties diverge in their view is whether the Plaintiff is correct in its assertion that it is indeed in time because the latest date within which it became aware of its right to claim against the Defendant was 9th October 2001.

12. The issue for me is whether the pleading that the Plaintiff was *empêchée* during the period from January 2001 when the representation concerning the indemnity was made and the date of the investment meeting on 9th October 2001 has any chance of succeeding at trial.

13. The modern law in both bailiwicks as to the extent to which the doctrine of *empêchement d'agir* is available to a plaintiff faced with a defence of prescription is still somewhat inchoate despite a number of helpful decisions at first instance and on appeal.

14. The first case in date order was the decision of the Privy Council in *Vaudin v Hamon [1974] AC 569* and the speech of Lord Wilberforce at page 586. This was a comment following a somewhat vague suggestion that the Appellant's absence in Mauritius for many years during which time he was unaware of what was happening in Sark entitled him to claim he was *empêché*. Lord Wilberforce reached no conclusion on the merits save to concede that *empêchement* was still part of the law of these islands, but that the examples of impediments quoted in the older authorities may not qualify in the modern age. He then goes on:-

> *"As regards ignorance, this too is mentioned in some of the Commentators, but only when brought about by fraud or misrepresentation (see Laurent Carey Essai sur les Institutions, Lois et Coutumes de l'Ile de Guernesey p. 207)*

15. The next case was *Public Services v. Maynard [1996] JLR 343* in which the finding of the Royal Court as a preliminary issue that prescription would not run against a plaintiff who unbeknown to him had many years previously contracted asbestosis when working for the States of Jersey was upheld. However the Court of Appeal went on to emphasise that at trial evidence would be required from the plaintiff to show as a fact that it would have been impossible to have discovered his condition earlier. It was because of this necessity for a factual finding that Southwell JA on the final page of the judgment suggested that in future the Jersey Court should consider changing its approach in such cases to enable all the issues of fact to be tried together.

16. That was followed by Boyd v Pickersgill [1999] JLR 286 another interlocutory appeal from a decision of the Royal Court of Jersey relating to prescription and *empêchement* in a case of alleged advocate's negligence. There at first instance the plaintiff was held to be out of time. Reversing that decision Beloff JA delivering the lead judgment said this at page 291:-

> *"In my view, the epithet "practical" deployed in Maynard softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not per se trigger suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment … The test, as it seems to me, is whether the ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances.*
>
> *……*
>
> *Reasonableness as a test to distinguish between relevant and irrelevant for this purpose seems to me to be appropriate. It engages a much deployed legal standard, it satisfies the requirement of perceived public policy and it gives appropriate latitude to the prospective claimant without too seriously undermining the rationale of prescription periods"*

17. Then we have the valuable judgment of Day DB in *Holdright Insurance Company Limited -v- Willis Corroon 25th August 2000 [29 GLJ 40]* but otherwise unreported, in which he had to deal with a multiplicity of issues including *empêchement*, the existence of which he acknowledged at any rate in contract actions. Day DB was of the view that the proper procedure was for *empêchement* to be pleaded by way of *réplique* (which is what Ms Tee has done here). Just as prescription is a shield for the defendant against stale claims *empêchement* is a shield against a plaintiff being cut off from proceeding by prescription.

18. Finally we have the recent Guernsey Court of Appeal decision in *Yaddehige v. Credit Suisse Trust and others 2007 - 08 GLR p.282* Again this is a decision on an appeal on a preliminary issue as to whether an action was prescribed and whether the plaintiff could claim to be *empêché.* The Court held that on the facts pleaded he could. The case involved issues relating to failures of professional advisers to do what they should have done to ensure the plaintiff was not prejudiced tax wise when he moved to Guernsey – a much more complex set of issues than we have here but like this case the plaintiff had been dilatory and could only succeed if he could show that he had been *empêché* until a date which fell within the prescription period. I adopt the approach of Smith JA:-

> *"In my view the essential issue is whether on the pleaded facts the plaintiff could succeed on any basis in persuading the court of trial that his claims are not prescribed"*

19. I come back to Laurent Carey at page 207 in which he says

> *"Elle [la prescription] ne court contre qui est ignorant de son droit au moyen de fiction ou de deception dont on aurait use envers lui".*

As pleaded the Plaintiff's case is that there was a breach of contract or negligence on the part of the Defendant in not selling its shares when instructed. No damage immediately ensued but all the same the Plaintiff chased the matter up on two occasions until the intervention of the "*fiction*" emanating from the mouth of Ms Stopher that the Defendant would indemnify any loss. The Plaintiff did not press the Defendant during the summer of 2001 to do what it was supposed to do namely to comply with its direction to sell and loss first occurred in August 2001 when the

value of the shares fell. The Plaintiff did not discover it had been misled until the interview with Mr Fairbourne on 9th October 2001. In my judgment there is an argument that there was a practical impossibility for the Plaintiff to realise until 9th October that it had a claim against the Defendant and therefore I cannot say to use the words of Smith JA that the Plaintiff could not succeed on any basis in persuading the court of trial that its claims are not prescribed. The exception is therefore rejected.

20. That said the period of possible *empêchement* was relatively short - some eight months. It seems extraordinary that the Plaintiff has to be relying on this in the overall timescale of these proceedings. However had proceedings commenced eight months earlier the Defendant would probably still have been faced with a stale claim. I have considerable sympathy with the concern that the Defendant has that this whole claim seems to have proceeded on the basis that the proceedings are instituted without allegedly any prior notice to the Defendant at the very last possible moment. The Plaintiff's case does seem a little strange but I can form no view of the facts or the ultimate outcome in law in an area to use the words of Beloff JA in paragraph 41 of *Yaddehige* the issues are *"acutely fact sensitive and raise not altogether easy points of law"*. These are entirely matters for the Court of trial.

