

Judgment 5/2004

**Strawn v Hemery Trustees Limited – Royal
Court (Civil Action file 470), 16 March 2004**

Civil Action – Exceptions de Forme – further and better particulars – proceedings must be progressed to trial at a reasonable level of cost and within reasonably short time.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 16th day of March, 2004 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E.
Lieutenant Bailiff; sitting alone

CHARLES EDWARD STRAWN

Plaintiff/Respondent

V

HEMERY TRUSTEES LIMITED

Defendant/Applicant

WHEREAS on 5th February, 2004 the
Lieutenant Bailiff considered an application by the Defendant for further and better particulars as
set out in its Exceptions de Forme and heard thereon Advocates M.G. Ferbrache and R. G.
Shepherd Counsel for the Plaintiff and Defendant respectively.

The Lieutenant Bailiff this day handed down
judgment in the terms attached hereto and

1. DISMISSED the said Exceptions save for the limited extent stated in paragraph
24 of the said judgment
2. Reserved the question of costs.

S.M.D. ROSS
Her Majesty's Deputy Greffier

the exclusive right to use and exploit all commercial tie-ups and merchandising rights arising from it. The capital value of the consideration was stated to be £380,000, (the notional value of the Work) and the income from it was intended to be paid by way of an annuity to the Plaintiff of £28,500 per annum during his lifetime.

6. CB Trustees Limited (CB), the Second Defendant, replaced Hemery as Trustee by virtue of an instrument dated 26th March, 1998. CB were at all material times managed by Guernsey Accountants Chandler, Backer & Co, whose partners included Mr. Backer and Mr. Mahé, who were also directors of CB: hence their inclusion in the title of the Cause as Fourth and Fifth Defendants. Advocate Mark Ferbrache, who has throughout represented Mr. Strawn informed the court that the pleadings are now closed as between all the remaining Defendants except Hemery, but it is appropriate, in order to set this case in its proper context, to add a word about the other Defendants.

7. Originally there were applications for substituted service on the First, Third, Eighth and Ninth Defendants, some of whom are now, for practical purposes, no longer involved in the suit. The Seventh Defendant, in respect of whom the case was withdrawn on 10th October, 2003, was beneficially owned by Mr. Willems who died on 9th April, 2003. I am informed that the Sixth Defendant has been struck off the Companies register. The Bailiff refused leave to serve proceedings on Hemery in Jersey, but this decision was reversed by the Court of Appeal, with the result that it became joined in the action from 27th October, 2000. Its Defences, including the *Exceptions* by which Hemery seeks these further and better Particulars, were filed on 7th September, 2001.

8. It is alleged in the Cause that both Hemery, the former Trustee, and CB, the subsequent Trustee, are guilty of breaches of trust as against the Plaintiff; the relevant paragraphs in the Cause are 33 to 36 as regards Hemery, and 37 to 42 in respect of CB. One of the allegations against CB is that when it was appointed in place of Hemery it failed to make enquiries which would have led to the discovery of the alleged breaches of trust by Hemery which are specified in paragraph 34, and its (CB's) failure to rectify those alleged breaches. Hemery is the present Applicant for Further and Better Particulars, which are resisted by the Plaintiff.

9. The Request for Further and Better particulars, containing thirty-nine individual requests, some of which were in turn sub-divided, was first served on Collas Day on 30th March, 2001. Those which Hemery contend have not been adequately answered appear in the Consolidated pleadings dated 28th February, 2003, in the form of averments that the Plaintiff has failed to particularise adequately, fully or properly the matters set out as *Exceptions de Forme* 1 to 4. Throughout the several hearings during which these matters were argued, Mr. Ferbrache and Advocate Shepherd, on behalf of Hemery, have agreed that those numbered 1 and 3 relate to the design of the tax structure intended to be created for the benefit of the Plaintiff, and 1 and 4 relate to the proposed financing of the 'annuity' which the Plaintiff had hoped to receive.

10. I take first paragraph 1, which encompasses paragraphs 4 and 5 of the Cause 'and later paragraphs' without specifying the later paragraphs. The preamble to the *Exceptions* refers to the Request for Particulars and then states that it was:

“...incorporated by reference into its original defences as *Exceptions de Forme*.”

11. Paragraph 1 of the *Exceptions* is, however, framed differently. It states that (according to the First Defendant)

“.....the Plaintiff fails to particularise adequately or at all how it is that the First Defendant can be liable or have duties towards the tax implications of a business established in Belgium.”

That is at variance with from the earlier set of requests under Paragraph 4, which sought particulars (a) of the persons who ‘intended’ that the Trust should be used as a vehicle to mitigate the Plaintiff’s liability to Dutch tax, (b) of the facts and matters relied on to establish that intention, (c) of the advice given by Messrs. Totty and Willems respectively to the Plaintiff and (d) the circumstances of the introduction by Mr. Totty of Mr. Willems to the Plaintiff (I assume here that the word ‘instruction’ in Request 7 (c) is a misprint for ‘introduction’).

12. Mr. Shepherd submitted that the Cause did not adequately show the case his client had to meet. For instance the impression given by, and the substance of, paragraphs 4, 5 and 6 of the Cause was that Mr. Totty and Mr. Willems were acting in concert: that they acted jointly in advising Mr. Strawn and in setting up the Trust to implement the scheme which Mr. Willems had devised. Yet, asked Mr. Shepherd, where does the word ‘jointly’ appear in any of those paragraphs?

13. The further impression created by these paragraphs, so Mr. Shepherd submitted, was of a ‘one-stop shop’, in which all the players in the scene which this part of the Cause sought to create combined to advise Mr. Strawn, which is wholly contrary to the facts and to the documentation so far disclosed. The result was a most tangled situation in which the Plaintiff had stopped short of actually alleging that Messrs. Totty and Willems acted jointly, but contrived to convey that impression by his pleading.

14. Mr. Shepherd referred to his Affidavit of 6th February, 2003, and its annexures, and in particular to paragraph 7, which is similar in its effect to paragraph 1 of the *Exceptions*, and states that nowhere in the Cause is the precise nature of the duty which Hemery allegedly owed to the Plaintiff, and for the breaches of which he is now claiming a declaration and extensive damages, spelt out. It is crucial for the First Defendant to know this, in view of the main thrust of Mr. Shepherd’s submission, which is that it was his client’s function to provide trustee services, not to give tax advice, whether in Belgium or elsewhere: that it never assumed a duty of care in connexion with the giving of Belgian or Dutch tax advice. The correct person to have been joined, if the Plaintiff’s advisers wanted to sue someone for breach of a duty of care in giving advice on taxation in those countries, would have been Mr. Willems (now deceased) who was the designer of the scheme.

15. I can well understand this line of argument. The fact that Mr. Totty, as the appropriate Director in Hemery who used his good offices to put Mr. Strawn into touch with the experts, Messrs. Willems and Arras, who would advise him on the incidence of Belgian tax, and on the applicability of Belgian law, does not mean necessarily that he shared responsibility for the advice thus given. In this respect Mr. Shepherd said Reply No. 22 must be incorrect, especially when viewed in the light of Mr. Willems’ comprehensive letter of 13th February, 1997, giving detailed advice as to the structure of the Trust.

16. To put it another way, it very probably was the intention of all three, as well as of Mr. Strawn, that the latter’s liability to tax would be mitigated as far as possible. It was also their intention that the Trust, when created, would be so structured, and designed. But Hemery’s function was to administer the Trust, which it did, albeit, from the Plaintiff’s point of view, unsatisfactorily: not to give advice which it was not qualified to give. Therefore, Mr. Shepherd said, he needs these particulars to enable his client to prepare properly for the case it has to meet.

17. The First Defendant has, however, managed to file a comprehensive Defence. In paragraph 4 of the Niances and Pretensions it has made its position clear on this aspect. Sub-paragraphs (c) and (d) specifically deny that the Trust or the tax mitigation structure was established on Mr. Totty’s advice or that Hemery ever offered these services to Dutch or Belgian residents (I think here ‘ever’ must be a misprint for ‘never’). Moreover, sub-paragraphs (e) and (f) go on to make positive averments. They specifically state that Hemery did no more than execute the structure which Messrs Willems and Arras had already designed and that Mr. Totty had introduced Mr. Strawn to Mr. Arras: it was he, not Mr. Totty, who had subsequently introduced the Plaintiff to Mr. Willems.

18. Considering the substance of the initial set of requests which were originally made in under Paragraph 4, I consider they have adequately been answered by Replies 3, 7 and 8. True, they reveal a conflict of fact as the circumstances of the introduction to Mr. Willems, and on the advice as to the creation of the Trust, but these are matters which are properly for resolution before the Jurats. I also think that Replies 4 and 5 really relate to discovery. The Plaintiff is saying there that any further information required can be given after disclosure of the correspondence in the First and Second Defendants' possession.

19. Turning to paragraph 5 of the Cause, this sets out the general pattern of the scheme whereby the Work would become the principal Trust property. As I have observed, from his letter of 13th February, 1997, written barely two months before it was created, it seems that Mr. Willems was the architect of the Trust. While it may be that paragraph 4 of the Cause does not precisely demarcate the respective functions of the persons therein identified as having given advice to the Plaintiff, in my view paragraph 5 does state with clarity that Mr. Willems was responsible for designing the scheme, which was to include the creation of the Trust, which Hemery later administered until replaced by CB.

20. Seen in this light, it seems to me that Reply No. 9, which is in answer to the series of Requests 9 to 12, is perfectly consistent with that correspondence, and tends to support Mr. Shepherd's contention as regards the respective functions of Hemery, Mr. Willems and Mr Arras. Although this will ultimately be a matter for the Jurats, it is arguable that, *prima facie*, Mr. Totty's letters to the Plaintiff of 14th November, 1995, and 23rd May, 1996, conveyed advice which he had received from his colleagues as to the best course for Mr. Strawn to pursue, given the latter's desire to obtain an income sufficient for his living expenses with minimal liability to tax, and given Mr Strawn's proposed re- location to Belgium, rather than that the advice was emanating from Mr. Totty.

21. The material in the first paragraph of the *Exceptions* is not in the form in which it appears, or in substance, a request for particulars. In my judgment, it consists of argument which should be advanced at the trial, (or, possibly, depending on the evidence available, by way of an application to strike out the words suggesting that Mr. Totty gave professional advice on either Belgian law or tax). That evidence could, possibly, be by way of an Affidavit to support such an application.

22. Taking paragraph 3 of the *Exceptions* next, this encompasses the particulars sought of paragraph 8 of the Cause, which is sub-divided into five, and recites the role played by Prism, the Third Defendant, which was owned indirectly by Hemery, and in respect of which I gave judgment regarding the Interrogatories administered by the Plaintiff on 18th December, 2001. Prism was intended as the medium through which the Work would be used, promoted and exploited. Judgment was entered against Prism for £15,046.91 and indemnity costs on 10th October, 2003.

23. Hemery sought extensive particulars of paragraph 8 and sub-paragraphs (b), (c) and (d). The complaint in paragraph 3 of the *Exceptions* is:

“.....the Plaintiff has failed to give full and proper particulars of the role of the Belgian advisers and is contradictory in its reference to their role within the Cause.”

There are two parts to this paragraph. The first part to an extent overlaps with the first *Exception*, and in my view has been answered by Replies 3,7 and 8 and also Reply 18, which again refers to Mr. Totty's letter to Mr Arras of 29th July, 1997, upon which, as I understand this Reply, the Plaintiff will rely at the trial. Replies 19 and 20 revert to Reply 18. If that is the Plaintiff's response to this set of requests, then he will be bound by it when the case comes to trial. Subject thereto, it seems to me that this set of responses is sufficient for the First Defendant's purpose, and that its adviser will be able to make such submissions in relation to that letter as he wishes at the trial.

24. As regards Request 8(b), which seeks particulars of the lectures delivered by the Plaintiff and ancillary details, the response in Reply 21 states that it should be possible to provide further particulars. This conflicts with the first sentence of that Reply, namely that the lectures have already been adequately particularised. If that is so, why is the Plaintiff prepared to provide further particulars after the discovery to which he refers? In its present form I consider this reply to be unsatisfactory, and I direct that the Plaintiff should clarify this answer within twenty-one days hereof.

25. Turning to 8(c), it would appear that the ‘Explanation’, the ‘Flow Chart’, the letter of 13th February, 1997, and other correspondence is included in the Bundle of Documents at TAB 5. They are specifically referred to in Reply 22, and Replies 23 and 24 refer back to Reply 22. Apart from the generalised allegation in the first part of *Exception 3*, Hemery have not said in what respect these documents fall short of providing full and proper particulars of paragraph 8(c) of the Cause.

26. Turning to the second part of the third *Exception*, no details are given of the alleged contradictions, even assuming that this is a legitimate aspect of the process of obtaining further and better particulars. There should be clear references so as to enable the reader to ascertain precisely which passage in the Cause is contradictory to another passage, which should also be specified. If such contradictory passages are shown, then the Applicant should in my judgment apply to the Court at the commencement of the trial for a direction that the Plaintiff states upon which of the one or the other of two contradictory passages he intends to rely. In my view it is not possible for this Court to determine this part of the third *Exception* in its present form. I therefore reject this *Exception*, and, for the reasons already given, I reject the first *Exception*.

27. This brings me to the Second and Fourth *Exceptions* which relate to the issue of how the intended annuity was to be financed. As I understand it in paragraph 2 of the *Exceptions* 16 is a misprint for paragraph 6 (a), in respect of which Requests 13, 14 and 15 were made on 30th March. Taking Request 13 first, this, once more, alleges, and asks the Plaintiff to explain, an alleged inconsistency between this sub-paragraph and the first sentence of paragraph 3 of the Cause.

28. I repeat that which I have just said in paragraph [26] of this Judgment regarding the contradictions alleged in the third *Exception*. This Request is not in accordance with the purpose of particulars. If there is in truth an inconsistency between the two paragraphs, then in my view it is a matter to be raised at the trial. I am further of the opinion that Requests 14 and 15 have been answered adequately by the reference to the two letters of 13th February and 29th July, 1997. It will be a matter for the Jurats to decide whether they prove this part of the Plaintiff’s case up to the standard required in a civil case.

29. I come finally to the fourth *Exception*, which is in relation to paragraph 8 (d) of the Cause. Mr. Shepherd has maintained that there is a manifest inconsistency over the agreement to pay Mr. Strawn the monthly amount stated in paragraph 8 (a), and the ‘annuity’ in 8(b). But, says Mr. Shepherd, it is only possible to get something out of the scheme if some form of capital is first put into it. An annuity, as it is commonly understood, can only arise if, for example, it is purchased for a lump sum from, say, an insurance company or similar institution.

30. It seems to me that this argument is based on a misconception of the meaning of the word ‘annuity’. The dictionary definition does not restrict the meaning to that claimed on behalf of Hemery. In addition to the third meaning ascribed to it, namely:

“Investment of money entitling the investor to a series of equal annual sums.”

there are two other meanings, *videlicet*:

“Sum payable in respect of a particular year; yearly grant.”

31. The wording ‘instead of the outpayment of the above mentioned capital value, Purchaser agrees to pay to’ [Mr. Strawn] ‘a life annuity based upon that capital’ in Clause 11 of that which has become known as the First Agreement is perfectly clear in its intention and meaning. It means that, in consideration for the assignment of all the benefits attaching to the Work, the Plaintiff will be accorded an annual income of £28,500, presumably in addition to the monthly amount in Guilders, via the mechanism that was to be created. The practical operation of the scheme is admirably summarised in the third paragraph of Chandler Backer’s letter of 29th July, 1999, at Tab 8 of the Bundle.

32. As I read both documents, Clause 11 is entirely consistent with Mr. Willems’ advice, because it envisages that the Plaintiff will receive a ‘yearly grant’ of £28,500. An investment of money in the form of capital, to produce that income, is not necessarily required. The intention clearly was that the assignee of the Work would promote it to its financial advantage. From the sums received the Trustee would pay the author of it an annual grant, similar to an annual royalty. In my judgment there is no substance in this *Exception*, and, for the foregoing reasons I dismiss the second and fourth *Exceptions*. In the result I take the view that the *Exceptions* should be dismissed, save to the limited extent stated in paragraph [24] hereof, and I do so.

33. This case has now taken four years since its inception. Over three years ago, in his concluding remarks in his judgment on Hemery’s application for Security for Costs, it is apparent that the Bailiff was troubled at the position of the Plaintiff, who was apparently penniless as a result of something going very wrong with the management of his affairs.

34. Due to the varied nature of the Plaintiff’s case against nine different Defendants, who are mostly overseas, the difficulty in obtaining hearing dates which are suitable to the Advocates concerned, and the unavoidable gap between the hearings, it has not been possible to move the case on as much as might have been hoped. However, I draw attention to *Gruppo Torras S.A v. Sheikh Fahad Mohammed Al Sabah & Others*, Jersey Court of Appeal, 27th July, 2000, (unreported), which was cited by Mr. Shepherd in the recent case of *E-Vest.Com Ltd v. J. Lee-Barber & TradeCell Ltd*, 16th February, 2004. I quote from para graph 31 (3) of Southwell J.A.’s Judgment as follows:

“From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be to progress those proceedings to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within reasonably short time.”

A.R.W.Hancox
Lieutenant Bailiff
16th March 2004