Judgment 07/2013

Toor v Butterfield Trust (Guernsey) Limited & others, & Braude, Liebeck & Ruttenberg
Royal Court
20th March 2013

Exception de Fond

Approved Text
20.03.2013

IN THE ROYAL COURT OF GUERNSEY
(CIVIL DIVISION)

Between: **MS EDITH ARMSTRONG TOOR** **Plaintiff**

-v-

BUTTERFIELD TRUST (GUERNSEY) LIMITED & OTHERS **First Defendant**

-and-

BEATRICE LOUISE BRAUDE **Second Defendant**

-and-

DANIELLE ELISABETH LIEBECK **Third Defendant**

-and-

ANNETTE BEATRICE RUTTENBERG **Fourth Defendant**

Hearing date: **21st February 2013**
Judgment handed down: **20th March 2013**
Before: **Richard James McMahon, Esq., Deputy Bailiff**

Advocate for the Plaintiff: **Advocate N J Barnes**
Advocate for the First Defendant: **Advocate A D Laws**
Advocate for the Second to Fourth Defendants: **Advocate S L Brehaut**

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
Agnew v Länsförsäkringsbolagens [2001] 1 AC 223
The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988
Snell's Equity, 32nd ed.
Mahoney v Purnell [1996] 3 All ER 61
Burrows, *The Law of Restitution*, 3rd Ed.
Jennings v Cairns [2003] EWCA Civ 1935
Cheese v Thomas [1994] 1 WLR 129
The Trusts (Guernsey) Law, 2007
In the matter of the C Trust [2012] JRC 086B
In re Sir Lindsay Parkinson & Co Ltd Settlement Trusts [1965] 1 WLR 372

Introduction

1. Paragraph 4 of Les Defenses of the Second to Fourth Defendants, Beatrice Braude, Danielle Liebeck and Annette Ruttenberg, raises an *Exception de Fond* in respect of the action brought by the Plaintiff, Edith Toor, in the following terms:

> "*It is averred that under the Law of Guernsey the Plaintiff's stated case does not show a valid claim or cause for damages against the Second to Fourth Defendants."*

2. In so far as it was necessary, the Second to Fourth Defendants have also made an application to the Court, dated 21 January 2013, for an Order that the Second to Fourth Defendants shall cease to be parties to the proceedings, made pursuant to rule 37 of the Royal Court Civil Rules, 2007.

3. The Plaintiff's action involves a claim to set aside a Deed of Exclusion made on 12 November 2009 by the First Defendant, Butterfield Trust (Guernsey) Limited, and Jacobus Roselaar, in his capacity as the protector of a discretionary settlement formerly known as the Joanda Third Trust and now known as the Roselaar Trust. The Plaintiff's Cause alleges that Mr Roselaar's consent, as required under the terms of the settlement, had been obtained by the undue influence exerted by the Second to Fourth Defendants, or relatives of theirs. Such undue influence should be regarded as vitiating that consent, meaning that the Deed of Exclusion is invalid and of no effect. The Plaintiff claims a declaration in those terms, an order cancelling the Deed of Exclusion, and, particularly for the purposes of dealing with the *Exception de Fond*, as against the Second to Fourth Defendants, damages in the sum of US$100,000. That figure is pleaded at paragraph 33.3 of the Cause as comprising the Plaintiff's estimated US attorney fees in respect of these proceedings in the sum of $75,000 and $25,000 in respect of the loss of the use of the funds which might otherwise have been available to the Plaintiff had she not been excluded as a beneficiary.

Background

4. For the purposes of resolving the *Exception de Fond*, alternatively the application to cease to be parties to the action, I do not need to go into great detail about what is said against the Second to Fourth Defendants in relation to the events of October, November and December 2009. Suffice to say that the Plaintiff and Mr Roselaar had become friendly during the preceding 14 or so years and it is alleged that the Plaintiff had become emotionally and financially dependent, at least to an extent, on Mr Roselaar. On the Plaintiff's case, Mr Roselaar had indicated that he would make provision for the Plaintiff to take effect after his death and had provided her with a document to be opened only after his death, indicating the

trustees to whom she was to have recourse in that eventuality. The Plaintiff lives mostly in California. When she was contacted there by Peter Braude, husband of the Second Defendant, at the start of October 2009, the Plaintiff duly travelled to London to visit Mr Roselaar. Over the course of the following few weeks, events evolved in such a way that it was suggested to the Plaintiff that she leave London and, within a short period thereafter, Mr Roselaar gave instructions to the First Defendant, and joined with it in executing the Deed of Exclusion, thereby giving his consent to the Deed that was made by the First Defendant, the trustee of the settlement. Mr Roselaar then sadly died on 11 December 2009.

5. It is accepted by Advocate Brehaut on behalf of the Second to Fourth Defendants that if the claim for damages against those Defendants cannot at this stage be ruled as unavailable in law, then the three Defendants must remain as parties. Advocate Barnes acknowledged that the Plaintiff was aware of the adverse cost consequences if this claim were to be pursued and resolved against the Plaintiff. On behalf of the Plaintiff, Advocate Barnes submitted that the question whether compensation is available generally as a remedy in cases of undue influence has been left open as a matter of English law. Accordingly, because the issue has not been resolved one way or the other definitively under English law, and certainly has not been resolved as a matter of Guernsey law, it would not be appropriate to decide such an issue of law at a preliminary hearing. He suggested that it would be more desirable for such an issue to be dealt with following a full trial where the Court would have the benefit of hearing all the facts.

6. By contrast, the position of the Second to Fourth Defendants was set out by Advocate Brehaut at paragraph 14 of her Skeleton Argument in reply as follows:

> "*The correct position is that the prevailing view amongst the majority of both judges and commentators alike is that monetary compensation is not available, with the commentators distinguishing the case of Mahoney, to which the Second to Fourth Defendants referred in their first skeleton argument, as being a case based upon the equitable wrong of breach of fiduciary duty, not undue influence.*"

Therefore, in order to resolve this issue, I need to consider the basis on which Advocate Brehaut asserts that that is the correct position.

7. Advocate Brehaut placed particular reliance on a passage from the speech of Lord Millett in *Agnew v Länsförsäkringsbolagens AB* [2001] 1 AC 223, at page 264H:

> *"Contracts are consensual transactions; they depend for their validity on the consent of both parties. The apparent consent of one party, however, may be obtained by duress or undue influence or induced by mistake or misrepresentation however innocent. English law does not, generally speaking, regard such circumstances as giving rise to an independent cause of action. Instead it treats them as vitiating consent, and allows the party whose consent was affected to avoid the contract. There is no "obligation" not to exercise undue influence in order to persuade a party to enter into a contract. The party exercising influence incurs no liability. It is merely that the party whose consent was obtained by the exercise of undue influence is entitled to have the contract set aside."*

It is fair to note that what Lord Millett had to say was not determinative of this particular case. Lord Millett was in a minority of two in the House of Lords and the case in any event turned on the proper interpretation of provisions of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988. The case concerned complex issues about the law of re-insurance and the Lugano Convention itself, which is not, in any event, part of Guernsey law. His Lordship's comments about the position in English law, therefore, although supported by the passages to which I will turn shortly, does

acknowledge that the position described is not definitive or conclusive because of his use of the words "*generally speaking"*.

8. The passages from the various practitioners works and the article to which Advocate Brehaut's skeleton argument refers are of similar effect. For example, paragraph 7-068 of *Snell's Equity*, 32nd ed., commenting on the distinctions between the fiduciary doctrine and the doctrine of undue influence, states:

> "*Undue influence allows the party who was unduly influenced to rescind the transaction but does not normally result in an award of compensation. This contrasts with fiduciary doctrine, where equitable compensation is available."*

The authority cited for the first sentence is the Agnew case and for the second sentence is the case of *Mahoney v Purnell* [1996] 3 All ER 61. In respect of the first proposition, I note similarly the use of the word "*normally"*, the implication being that there may be other cases which are not the normal situation.

9. A useful summary of the position, at least as it applies in English law, is set out on page 289 of *The Law of Restitution*, 3rd ed., by Professor Andrew Burrows:

> "*Separate from rescission and counter-restitution for undue influence is an award of equitable compensation for the equitable wrong of breach of fiduciary duty. This is of analogous to an award of compensatory damages for the tort of deceit which may, of course, be awarded in addition to, or instead of, rescinding a contract for fraudulent misrepresentation. In Mahoney v Purnell, May J decided that as precise restitution, unwinding a transfer of shares, was not possible because the company had been wound up so that the shares could not be returned, the fair and just remedy was instead to award compensation for the loss the claimant had suffered in entering into the contract. On the best interpretation of the case, the compensation was not being awarded for the undue influence as such. Undue influence is not an equitable wrong triggering compensation. Rather the compensation was for the equitable wrong of breach of fiduciary duty."*

10. *Mahoney v Purnell* (*supra*) is referred to in a similar vein by the various learned authors to whom reference was made in Advocate Brehaut's Skeleton Argument. May J gave judgment after what appears to have been an eight-day trial. At page 86d, His Lordship stated:

> *"The normal remedy where a claim based upon undue influence succeeds is for the transaction to be set aside with, in appropriate circumstances, an account of profits. In this case, it is agreed and obvious that the parties cannot be restored to their former positions."*

Then, after explaining how he reached his conclusion, His Lordship indicated (at page 91c) that "*the court is able to give the commonsense and fair remedy suitable for the peculiar circumstances of this case"*. In doing so, he had emphasised (at page 88j) that "*Practical justice in this case requires an award which is akin to damages"* and added that this course of action was not "*to award [the Plaintiff] damages, but fair compensation in equity as an adjunct to setting aside the agreement"* (at page 89c). Once again, at the risk of labouring the point, by using "*normal*", May J must be taken as acknowledging the possibility that, in a given case, some other remedy might be appropriate.

11. I have not found the passage in the judgment of Arden LJ in Jennings v Cairns [2003] EWCA Civ 1935, to which Counsel referred, particularly helpful. What is clear from that case is that the court upheld an order that the person found to have exercised undue influence was obliged to repay to the estate, which had suffered loss as a result thereof, sums of money. This outcome, it seems, was designed to put the parties back into the position they

were in before the undue influence intervened. The case, therefore, does not deal with the question as to whether or not that was a form of damages or, as is more likely, equitable compensation. In my view, any more detailed consideration of this case does not take the matter any further forward.

12. I did, however, find *Cheese v Thomas* [1994] 1 WLR 129 of considerable assistance. It was a different factual situation, but Sir Donald Nicholls V-C set out some general principles which I consider can be treated as relevant to the present case. At page 137B, His Lordship indicated that:

> "*The basic objective of the court is to restore the parties to their original positions, as nearly as may be, consequent upon cancelling a transaction which the law will not permit to stand. That is the basic objective. Achieving a practically just outcome in that regard requires the court to look at all the circumstances, while keeping the basic objective firmly in mind. In carrying out this exercise the court is, of necessity, exercising a measure of discretion in the sense that it is determining what are the requirements of practical justice in the particular case."*

This was just one of a number of references to "*practical justice*". The judgment also describes the court as being a "*court of conscience*". It strikes me that it would be premature for this Court to jump to a conclusion without knowing the full facts that the damages claim simply cannot be pursued by the Plaintiff. Although pleading damages, rather than some other form of obtaining monetary redress may be a strange route to take towards achieving "*practical justice*", I consider that that the Plaintiff, knowing the risks associated with pursuing this claim, should not be precluded from having that aspect of her action considered further by the Court, praying in aid the Court's conscience and its desire to achieve practical justice appropriate to any peculiar circumstances being advanced.

13. Accordingly, whilst I do not underestimate the difficulties the Plaintiff faces in succeeding with this claim, but, as I have just said, none of the cases to which I have referred, nor the learned commentators in these areas, have ruled out completely the availability of some form of monetary payment being ordered where the circumstances of the case so merit. Whether that is an appropriate remedy to order, should, in my view, be resolved after hearing the evidence and considering the legal position in the light of that evidence.

14. Having reached that conclusion, the *Exception de Fond* raised at paragraph 4 of Les Defenses of the Second to Fourth Defendants inevitably fails. This also means that the Second to Fourth Defendants are properly joined as parties facing such a direct claim. However, in case it is at all relevant, I will proceed briefly to deal with the other aspects of the arguments of the Second to Fourth Defendants.

Consequences of trusts litigation

15. These contentions really relate to the nature of the proceedings. The Second to Fourth Defendants assert that these are really, in substance and effect, proceedings that should have been brought by way of application pursuant to section 69 of the Trusts (Guernsey) Law, 2007. In doing so they draw attention to a Jersey case, *In the matter of the C Trust* [2012] JRC 086B, in which application was made under the equivalent of section 69 of the 2007 Law to set aside an instrument of appointment. In response, Advocate Barnes has referred to *In re Sir Lindsay Parkinson & Co Ltd Settlement Trusts* [1965] 1 WLR 372, which indicates that, if a choice exists, either form of instituting proceedings can be chosen. At least at this stage, it was entirely appropriate for the Plaintiff to commence her proceedings by way of summons and the tabling of a Cause rather than an application pursuant to the 2007 Law. Had this been no more than a straightforward application in proceedings dealing with the trust, then I accept that the more usual way of commencing them would have been by way of application, with affidavit evidence in support. That does not mean to say that the method

chosen by the Plaintiff is wrong in law, but it does mean that the proceedings will be progressed in a different manner than if they were conducted in the usual trust litigation way.

16. Because they argue that this is trusts-related litigation, the Second to Fourth Defendants refer to, and rely on, rule 35 of the Royal Court Civil Rules, 2007, which provides:

> *"(1) An action may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ("the beneficiaries").*
>
> *(2) Any judgment or order given or made in the action is binding on the beneficiaries unless the Court orders otherwise in the same or other proceedings."*

Whilst it is clear that rule 35 provides a means by which the beneficiaries of a trust will be bound by the outcome of litigation, even when they are not parties to it, that is not, in my view, a complete answer to the question as to whether or not the beneficiaries properly should be joined to trusts related litigation.

17. Given the way the Plaintiff's case is put on her behalf by Advocate Barnes, the real dispute here is between the Plaintiff on the one hand and the Second to Fourth Defendants, and their associates, on the other hand. It is a dispute about what went on in London in the autumn of 2009 and the consequences thereof. Although it has been suggested that the position of the First Defendant, as trustee, is not one that is completely neutral (its defence showing that one of its employees took steps to satisfy himself that what was being done was being done of Mr Roselaar's own free will), there still remains a strong flavour to this litigation that it is akin to a hostile dispute between the excluded former beneficiary of the trust and the remaining beneficiaries. In those circumstances, the "*feel"* of the case is one where the costs consequences will potentially be resolved as between the Plaintiff and the Second to Fourth Defendants, or one or more of them, rather than everyone looking to the trust fund to reimburse them with the costs that they incur, ie, it would potentially attract the label "*Buckton* 3". Accordingly, the overall picture is one where the Second to Fourth Defendants have properly been joined as parties.

18. Advocate Barnes referred to the ruling given on 13 April 2011 by Deputy Bailiff Collas (as he then was) on an application to set aside an order for permission to serve the Second to Fourth Defendants out of the jurisdiction made pursuant to rule 8 of the 2007 Rules. From the unofficial transcript produced by AO Hall, it is apparent that Mr Collas considered the relief claimed in the Plaintiff's Cause and concluded "*I am therefore satisfied that it was proper that they be joined as parties to the action"*. Advocate Barnes submitted that this conclusion created an issue estoppel in this regard. In contrast, Advocate Brehaut submitted that this was not comparing like for like. Whether it is properly an issue estoppel or *res judicata*, or whether rule 37 of the 2007 Rules, or the *Exception*, enables the Second to Fourth Defendants to argue that subsequent events indicate that they have unnecessarily been joined as parties, the conclusion I have reached that, even in a trusts context, the Second to Fourth Defendants should remain as parties is consistent with that of my predecessor so the matter does not require any closer analysis.

19. In summary, therefore, I would have been minded, even if I had not concluded that it was inappropriate for the Second to Fourth Defendants to seek to extricate themselves from the Plaintiff's Cause in the manner already described, to conclude that the Second to Fourth Defendants are properly joined as parties to these proceedings, despite the effect of rule 35 of the 2007 Rules. In my view, they are better placed, even with the costs implications that arise, if they continue as parties rather than the action proceeding by way of a claim by the Plaintiff solely against the First Defendant. I have some sympathy with the position of the

First Defendant as set out in the position paper lodged by Advocate Laws on its behalf, that the First Defendant trustee would potentially need to invoke the court's consideration of whether additional parties properly should be joined and it would be unnecessarily complicated, cumbersome and not cost effective (see, eg, rule 1 of the 2007 Rules) to engage in that exercise.

Conclusion

20. For the reasons given, I dismiss the *Exception de Fond* raised by the Second to Fourth Defendants and, so far as it is necessary to do so, their application dated 21 January 2013 to cease to be parties to the proceedings. This case should, in my opinion, now be progressed in a timely fashion to make sure that the memories of those who will give evidence do not fade further than they may already have done. In the absence of agreement between the parties as to the requisite steps between now and trial and the timetable in respect thereof, the matter should be re-listed before a suitable Interlocutory Court in the near future.

21. The same applies to the costs of this application. Because the Second to Fourth Defendants have been unsuccessful, there is a likelihood that I will conclude that they should pay the costs in any event. However, the best solution for now, may well be for the costs formally to be reserved until after the trial.

