Broadhead v Spread Trustee Company Limited et al
Court of Appeal
4th February, 2015

JUDGMENT 13/2015

Application for leave to appeal from a judgment of the Royal Court handed down on 26th November, 2014.

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

Civil Appeal No. 492

4 February 2015

Before: **David Anderson QC**
sitting as a Single Judge

Between: **RAYMOND ANTHONY DOBSON BROADHEAD** **("the Appellant")**

v

(1) SPREAD TRUSTEE COMPANY LIMITED
(2) ANDREW POLLOCK
(3) GEOFFREY WILLIAM ALLEZ **("the Respondent")**

Advocate for the Appellant:
Advocate for the Respondent:

Judgment on leave to appeal

Anderson, JA

This is an application for leave to appeal from the judgment handed down on 26 November 2014 by her Honour Hazel Marshall QC, Lieutenant Bailiff, on the hearing of a preliminary issue in this action. That application is made in the alternative, the Applicant's primary submission being that leave is not required at all. The Respondents by letter of 15 January and through their advocates today have indicated that they are neutral on the questions both of whether leave is required and, if so, whether it should be granted.

The Applicant is a residuary beneficiary of two trusts. In proceedings which were launched in July 2013, he claims that the trustees between about 2000 and 2008 were grossly negligent in their management, causing significant loss and damage to the trusts which the Applicant assesses, though without at this stage the benefit of discovery or expert evidence, at some £18 million.

The preliminary issue which gives rise to this appeal is one of limitation. The Respondents contended in the Royal Court that the claim is time-barred in its entirety pursuant to section 76(2) of the Trusts Law, which requires an action founded on breach of trust to be brought within three years from the date on which the claimant first has knowledge of the breach. The parties differ as to when they say that actual knowledge was acquired.

- The Respondents say, and the Royal Court found, that the Applicant had the requisite knowledge before July 2010, with the result that the claim begun in July 2013 is statute-barred.

- The Applicant says that he acquired the requisite knowledge only in late 2011 or early 2012, when he made a successful application to the Royal Court for the production of various documents. If that is correct, the claim was brought in time.

Is leave to appeal required?

Under section 15(e) of the Guernsey (Court of Appeal) Law 1961, leave is required to appeal "any interlocutory order or interlocutory judgment", with immaterial exceptions.

An analogous provision was contained in Order 59 of the Rules of the Supreme Court, which were in force in England and Wales until 1999. There is guidance both in those rules and in the English case law as to when an order was considered interlocutory (leave to appeal required) and when it was considered final (no leave required). The distinction is no longer relevant for that purpose in England, but remains relevant in Guernsey.

The general principle, as expressed in Order 59 rule 1A(3), was that a judgment or order was to be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it. The Royal Court's decision on limitation did finally determine this action, subject to appeal, but had it gone the other way, again subject to appeal, the action would have remained live. Rule 1A(3) did not therefore render a judgment on the issue of limitation final. Neither did Rule 1A(5), which set out various categories of orders that were to be treated as final in any event.

Rule 1A(6)(ff) included within the categories of judgments and orders to be treated as interlocutory "an order directing or otherwise determining an issue as to limitation of actions other than as part of a final judgment or order within the meaning of paragraph (3)".

But it was otherwise when the ruling on limitation was made at the conclusion of one part of a final hearing or trial. By Rule 1A(4),such rulings were treated as if made at the end of the complete hearing or trial, even if other issues remained to be determined. As explained in the note at 59/1A/4 of the 1999 White Book (the last to be issued before the Rules of the Supreme Court were in large part replaced), the conclusion of a trial of a preliminary issue was to be counted as final, notwithstanding that it could conclude the entire cause or matter only if it was decided in a particular way.

The note at 59/1A/21 dealt specifically with limitation, stating:

> "If ... the limitation issue is determined at the final trial or on an application to disapply the limitation period any order made on the limitation issue will itself be final, by virtue of the concluding words of sub-rule 6(ff). ***The same will be so, even if the limitation point is tried as a preliminary issue or by way of a sub-trial, because an order made at the conclusion of any part of a split trial is final within the meaning of r.1A(3) by virtue of r. 1A(4)."***

An earlier version of that passage, identical in material respects, was approved by the English Court of Appeal in *Dale v British Coal Corporation* [1992] 1 WLR 964, at 967H. It was thus clearly envisaged that an order following the trial of a limitation defence as a preliminary issue would be final rather than interlocutory. It is precisely such an order that was made by the Royal Court in this case.

The Respondents, though represented in court, have put forward no counter-argument on this point. Nor has it been suggested to me that there is any good reason why the law of Guernsey should in this respect depart from the principles formerly applicable in England and Wales.
Indeed Advocate Davidson refers me to the case of *McNamara v Gauson* [2009-10 GLR 387], in which Deputy Bailiff Collas noted at paragraph 11 that the principle derived from *Salaman v Warner* [1891] 1 QB 734 (and formerly given effect in Order 59 rule 1A(3)) is followed in Guernsey as it is in Jersey.

It follows that in my judgment the judgment of the Royal Court is final and that no leave to appeal from it is required.

Exercise of discretion

In case I am wrong in the conclusion just stated, I consider very briefly how I would have exercised my discretion had leave to appeal been required.

Under the law as declared in *McNamara v Gauson* (paragraphs 21-32), permission will be given if an appeal has a real prospect of success or, in exceptional circumstances, if there is an issue which, in the public interest, should be examined by the Court of Appeal.

The Jurats were directed in this case that the degree of knowledge that set time running was knowledge which would make it reasonable for the Applicant to begin to investigate whether there had been a breach of trust such as that which he was now pleading. The Royal Court was strongly influenced by the case of *Haward v Fawcetts* [2006] 1 WLR 682, in which the House of Lords applied a similar test to actions in negligence under the Limitation Act 1980. I make no comment on the strength of the various bases on which the Applicant seeks to contend that a different approach is appropriate here.

It does seem to me however that there is a public interest in this appeal being heard. The importance of professional trustee services for the economy of Guernsey scarcely needs to be stated.

Beneficiaries, trustees and advisers need to be certain where they stand in relation to the possibility of litigation when breaches of trust are suspected or alleged. In the circumstances it seems to me desirable that the Court of Appeal (which has not previously considered the point) should determine the degree of knowledge on the part of a beneficiary that starts time running under section 76(2) of the Trust Law. Had leave been required, I would have granted it on that basis. In view of the inter-related nature of the arguments I would not have sought to limit it to only certain of the grounds set out in the draft Notice of Appeal, though without of course purporting to pre-empt the ability of the full Court to determine whether each of those grounds was properly advanced.