[2009 JLR 217]
CHVETSOV v. BNP PARIBAS JERSEY TRUST CORPORATION LIMITED and MAISON ANLEY PROPERTY NOMINEE LIMITED

ROYAL COURT (Birt, Deputy Bailiff): June 19th, 2009

Trusts—beneficiaries—action against agent of trustee—agent appointed by trustee to hold trust property owes only contractual (and possibly tortious) duties to trustee—no trust (or other) duties to beneficiaries, who have no cause of action against it (unless agent aware beneficiaries acted to detriment on negligent advice or assumes responsibility)—if trustee refuses to enforce claim against defaulting agent, beneficiaries may (a) seek court directions that trustee take action; or (b) in certain cases, bring derivative action

The plaintiff brought proceedings against the defendants seeking the reconstitution of a trust fund.

The plaintiff was the settlor and a beneficiary of a discretionary trust of which the first defendant was the trustee. The trust assets included a property in England that was held by the second defendant as nominee for the trustee. In 2001, the plaintiff decided to renovate the property and the trustee accordingly authorized the second defendant to enter into the necessary contracts with a firm of architects and a contractor. The renovation works were more expensive than expected, which the plaintiff claimed was the result of the defendants' failure to manage them properly. He brought proceedings against them seeking the reconstitution of the

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trust fund, alleging breach of trust against the trustee; and breach of duties under trust and tort law against the second defendant. The trust provided that the trustee would not be liable for the negligence or fraud of any agent or delegate.

The plaintiff submitted *inter alia* that the second defendant owed duties under trust and tort law because (a) it was a close associate of the trustee, being a wholly-owned subsidiary; and (b) if he could not bring an action against it in such circumstances, where the trustee would not be liable for its actions, there could be a gap where no remedy would lie. The second defendant applied for the claim against it to be struck out under r.6/13(1) of the Royal Court Rules 2004, on the basis that it disclosed no reasonable cause of action. It appealed against the Master's refusal to strike out the claim.

Held, allowing the appeal:

As a mere agent or nominee of the trustee, the second defendant did not owe any duties under trust or tort law to the plaintiff or the other beneficiaries of the trust. The only duties it owed in connection with its appointment as agent were contractual (and possibly tortious) duties to the trustee, and only the trustee had a cause of action against it for any breach of those duties. The appeal would therefore be allowed, as it was plain and obvious that the plaintiff's claim against the second defendant could not succeed. The claim would be struck out and the second defendant would be discharged from the proceedings. If a trustee were to refuse to enforce a claim against a defaulting agent, *e.g.* because of a close association with the agent, the beneficiaries of a trust could either bring an administrative action seeking a direction from the court that the trustee take the necessary action (or, perhaps, that the trustee should be replaced) or, in special circumstances, they might be permitted to bring a derivative action on behalf of the trust. Although it could be said that the second defendant, as nominee, was itself a trustee, in that it held the trust property on a bare trust for the trustee, the sole beneficiary of that bare trust would have been the trustee and the second defendant would not thereby have assumed any trust obligations to the plaintiff or the other beneficiaries. In appropriate cases, an action by a beneficiary might lie against an agent of a trustee if the agent were aware that the beneficiary might rely on his negligent advice and therefore suffered economic loss, or if the agent assumed responsibility to the beneficiaries (paras. 9–14; paras. 19–20; para. 22; para. 26).

Cases cited:

(1) *Alhamrani* v. *Alhamrani*, 2007 JLR 44, referred to.
(2) *Caparo Indus. Plc.* v. *Dickman*, [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568; [1990] BCC 164, referred to.
(3) *Esteem Settlement, In re*, 2000 JLR 119, considered.
(4) *Freeman* v. *Ansbacher Trustees (Jersey) Ltd.*, 2009 JLR 1, distinguished.

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(5) *Henderson* v. *Merrett Syndicates Ltd.*, [1995] 2 A.C. 145; [1994] 3 W.L.R. 761; [1994] 3 All E.R. 506; [1994] 2 Lloyd's Rep. 468, referred to.
(6) *Rae* v. *Meek* (1889), 14 App. Cas. 558, *dicta* of Lord Herschell considered.

Text cited:

Lewin on Trusts, 18th ed., paras. 43–05 – 43–09, at 1785–1790 (2008).

D.M. Cadin for the plaintiff;
J. Harvey-Hills for the defendants.

1 **BIRT, DEPUTY BAILIFF:** This is an appeal against the decision of the Master on February 24th, 2009, when he dismissed the application to strike out the plaintiff's claim against the second defendant.

2 The application was brought under the Royal Court Rules 2004, r.6/13(1), namely that the order of justice discloses no reasonable cause of action against the second defendant. It follows that no evidence has been filed and the matter must be considered on the basis of the facts pleaded in the order of justice.
3 The test to be applied in such cases is conveniently summarized in *In re Esteem Settlement* (3) (2000 JLR at 127–128):

"It is only where it is plain and obvious that the case cannot succeed that recourse should be had to the summary jurisdiction to strike out. To quote from para. 18/19/10 of 1 *The Supreme Court Practice 1999*, at 349: 'so long as the statement of claim or the particulars disclose some cause of action, or raise some question 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 it out.'

This is particularly so in an uncertain and developing field of law."

Background

4 On May 22nd, 1996, the plaintiff, as settlor, established a discretionary trust governed by Jersey law known as the Metric Trust. The plaintiff is one of the beneficiaries of the trust. The first defendant ("BNP") is a trust company carrying on the business of providing trust services in Jersey and it has at all times been the sole trustee of the trust. The assets of the trust included a house in north London ("the property") which is occupied by the plaintiff and his family. The order of justice pleads that the second defendant ("MA") is a wholly-owned subsidiary of BNP which is accustomed to act as BNP's nominee in respect of real property owned by BNP as trustee. Somewhat surprisingly, the order of justice does not specifically plead that the property was, during the relevant period, registered in MA's

name as nominee for BNP as trustee of the trust, although it is clear by inference from the rest of the order of justice that this is what is alleged; indeed, there is no dispute on this and the answer of the defendants confirms that the property was held by MA as nominee for BNP and that MA executed a declaration of trust to that effect in favour of BNP as trustee of the trust.
5 In about 2001, the plaintiff decided to renovate the property. Following consultation with the plaintiff, BNP agreed to the proposal and, on October 9th, 2001, it passed a resolution authorizing MA as nominee on behalf of BNP to execute a contract with a named firm of architects for that firm to design and supervise the project. MA subsequently entered into such a contract. The plaintiff now claims that the renovations carried out were, in the event, more expensive than they should have been and resulted from the failure of the defendants to do what they should have done. The plaintiff says that the defendants failed to exercise the requisite skill and care, in that they failed to monitor, control or supervise the works of the architect which led to cost and time overruns. Furthermore, it is said that they failed to consult with or otherwise keep the plaintiff informed of the increased costs. As a result, the plaintiff and/or the trust and its beneficiaries have suffered losses, including in excess of £500,000 in unnecessary and additional costs incurred; an overpayment to the contractor of some £139,523; irrecoverable legal costs; and the costs of adjudication proceedings against parties involved in the works. The remedy sought is the reconstitution of the trust fund.

The claim

6 The claim against BNP is a conventional claim for breach of trust on the basis that BNP, as trustee of the trust, was in breach of its duties as trustee in relation to the renovation works. BNP denies that this is so but no legal point arises and the matter will fall for adjudication in due course at trial.
7 MA, on the other hand, argues that there is no reasonable cause of action pleaded against it. So how is the case put in the order of justice? The sole factual allegations are that MA was acting as BNP's nominee in entering into the contract with the architect and the contractor. Subsequently, it is pleaded that MA, or solicitors on its behalf, entered into correspondence concerning the defects, extensions, *etc.* This would of course follow on from the fact that it was the contracting party. In essence, therefore, the sole allegation is that MA had legal title to the property, which it held as nominee for BNP as trustee of the trust, and, on BNP's authority, entered into the relevant contracts as nominee for BNP and took steps consequent upon those contracts. There is no allegation that MA was at any time anything other than a nominee for BNP.

(i) *The trust claim*

8 The order of justice alleges that MA owed duties both as a matter of trust law and in tort. The trust duties are pleaded in the order of justice as follows:
"10 BNP and MA, as BNP's nominee, were under the following duties in its management of the trust and in particular of the works, namely:

(1) pursuant to art. 21(1) of the Trusts (Jersey) Law 1984, to act in its administration of the trust with due diligence, as would a prudent person, and to the best of its ability and skill, and at all times to observe the utmost good faith;

(2) pursuant to art. 21(3) thereof, to take all reasonable steps for the preservation and enhancement of the trust estate (being in this case primarily the property); and

(3) generally to exercise such care and skill as was reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that it had or held itself out as having;
(b) by reason of acting as trustee of the trust in the course of its business, to any special knowledge or experience that it was reasonable to expect of a person acting in the course of that kind of business; and

(c) to the special care and skill to be expected of a specialist trust corporation carrying on the business of trust management, including the ownership of real property in England."

9 I have to say that I do not see how, as a matter of law, MA could possibly owe such duties to the plaintiff or other beneficiaries of the trust. The duties pleaded are taken from the Trusts (Jersey) Law 1984. That Law sets out the duties owed by a trustee of a trust. There is, however, no suggestion that MA was a trustee of the trust; on the contrary, it is expressly pleaded in the order of justice that BNP was at all material times the sole trustee of the trust. The references to the 1984 Law are therefore irrelevant in the case of MA.

10 The legal position is that MA was simply an agent or delegate appointed by BNP in its capacity as trustee of the trust. If MA were to act negligently or beyond its authority in connection with that agency or delegation, the remedy would lie with BNP as trustee of the trust. Any duties owed by MA in connection with its appointment were owed to BNP as trustee of the trust, not to the beneficiaries. It would be similar in the case of an investment manager appointed by a trustee to manage the

investments of a trust. If that investment manager were to be negligent in the performance of his duties, the cause of action would lie with the trustee, not with any beneficiaries.

11 It is true that MA was in one sense a trustee because it held the property as nominee (*i.e.* on bare trust) for BNP as trustee of the trust. However, this was a completely separate matter from acting as trustee of the trust. MA held the property on bare trust for BNP, as trustee of the trust, and the remedy for any breach of that bare trust lies only with BNP, which, in its capacity as trustee of the trust, was the sole beneficiary of the bare trust. The fact that MA was acting as nominee for BNP cannot possibly mean that, simply as a result of so acting, MA thereby assumed the obligations of a trustee towards the beneficiaries of the trust.

12 I pressed Mr. Cadin on whether his researches had disclosed any case which established that an agent appointed by a trustee of a trust owed duties under trust law to the beneficiaries of the trust, merely by reason of such appointment, but he said that he had not found any such case. I further asked him whether there was any suggestion in any of the textbooks that such a duty might exist but he accepted that he had not found anything to this effect.

13 Mr. Cadin raised three arguments as to why I should hold that, despite the absence of precedent, the claim against MA was arguable.

14 First, he pointed out that the boards of BNP and MA were the same. There was complete commonality of personnel between the two companies. He submitted that, even if, in the case of an independent agent, no duties in trust law were owed by an agent to the beneficiaries, an exception should be made where the agent was a close associate of the trustee. I can see no grounds for introducing such a concept, nor any purpose in doing so. If there has been a breach of trust by the trustee, a claim will lie against the trustee on the part of the beneficiaries. If the agent has been in breach of his contractual duties towards the trustee, the trustee will have a claim against the agent. If the trustee (perhaps because of a close association) refuses to enforce its claim against the agent, the beneficiaries may institute an administrative action seeking a direction from the court that the trustee take the necessary action against the agent or, alternatively perhaps, that the trustee be replaced. As an alternative to an administrative action, the beneficiaries may in special circumstances institute a derivative action on behalf of the trust (see, for example, *Lewin on Trusts*, 18th ed., para. 43–05, at 1785–1787 (2008)). However, the closeness of the relationship between the trustee and the agent cannot, in my judgment, lead to the agent assuming duties as a trustee where this would not be so in the case of an independent agent. I should add that Mr. Cadin accepted that the plaintiff was not purporting to bring a derivative claim in the order of justice.

15 Secondly, Mr. Cadin argued that, unless the beneficiaries were allowed to bring an action against a negligent agent or delegate, there could be a gap where no remedy would lie. He pointed out that, like many trust deeds, cl. A10.03.01 of the trust deed in this case provided that the trustee shall not be liable for—

"... the negligence or fraud of any delegate or agent appointed or employed by the trustees or any of them in good faith although the appointment or employment of such delegate or agent was not strictly necessary or expedient."

16 Thus, in the case of a defaulting agent who caused loss to the trust fund, the beneficiaries might have no claim against the trustee because of the existence of such an exoneration clause and would also have no claim against the agent. This, he said, would be unsatisfactory and the court should therefore fashion a remedy to allow the beneficiaries to bring an action directly against the defaulting agent or delegate.

17 However, that is to ignore the fact that the trustee would have a cause of action against the defaulting agent and would therefore be able to obtain restitution of any loss to the trust fund. In the event of a trustee failing to enforce that right, the beneficiaries would have a remedy either by way of an administrative action to force the trustee to take action against the agent or by a derivative action, as described in para. 14. Accordingly, I do not agree with Mr. Cadin that there is a gap. Even if I am wrong, and there is such a gap, I do not consider that this would entitle the court to impose duties in trust law on an agent or delegate when there is no legal principle which would enable that to be done.

18 Thirdly, Mr. Cadin argued that this was a developing area of the law. He pointed out that my own observations referred, at para. 3 above, to the effect that particular caution in relation to a strike-out application is required in an uncertain and developing field of law. He referred to *Freeman* v. *Ansbacher*

Trustees (Jersey) Ltd. (4) and argued from this case that this was a developing area of law. It was very much on this ground that the Master declined to strike out the claim against MA.

19 I cannot agree that this is an uncertain or developing field of law. *Freeman* v. *Ansbacher* concerned an entirely different point relating to the application of the principle against reflective loss to claims by beneficiaries against trustees for losses incurred in a wholly-owned subsidiary of the trust. The present case is concerned with whether a beneficiary of a discretionary trust has a claim against an agent or delegate appointed by the trustee of the trust. In my judgment, for the reasons that I have given, the law in this area is entirely clear, nor is it developing. I have already mentioned that Mr. Cadin was unable to point to any case or textbook where it is suggested that a beneficiary might have a claim against such an agent. In this connection, I bear in mind the observations of Page, Commr.

in *Alhamrani* v. *Alhamrani* (1) (2007 JLR 44, at para. 40) where he considers when an area of law can be said to be in a state of development.

20 For these reasons, I consider that the allegation that MA owed duties as a trustee towards the beneficiaries as set out in para. 10 of the order of justice to be completely untenable and doomed to failure.

(ii) *The claim in tort*

21 As an alternative to the claim in trust law, the plaintiff claims against MA in tort. The matter is put as follows in the order of justice:

"11 Despite being aware of Mr. Chvetsov's total reliance on BNP for all matters connected with the trust, at no time did BNP or MA inform Mr. Chvetsov, still less obtain his agreement, that neither BNP nor MA would be taking any steps or actions to monitor, in the most general sense, the works, nor was Mr. Chvetsov informed that neither BNP nor MA would be exercising any supervision whatever over the works or the architect and would in effect be doing no more than making whatever payments the architect certified or requested.

12 Accordingly, and in the circumstances set out in para. 11 above, each and both of BNP and MA, in discharge of their duties as pleaded at para. 10 above, required the observance by BNP and MA of a duty of care to Mr. Chvetsov in tort not to cause damage to him and that each and both of BNP [*sic*] them should . . ."

There then follow a number of matters which it is said BNP and MA should or should not have done in relation to the works of renovation.

22 Paragraph 12 is hard to follow but it is clearly intended to allege that a duty of care in tort was owed *inter alia* by MA towards the plaintiff. I have to say that I see no arguable ground for saying that MA owed such a duty. An agent or delegate of a trustee owes a duty in contract (and possibly tort) to his principal (in this case BNP as trustee of the trust) but, in the absence of particular factors, he owes no duty of care towards the beneficiaries of the trust.

23 Again, I asked Mr. Cadin whether he had found any case in any jurisdiction which had held that an agent did owe such a duty of care towards beneficiaries or any discussion in a textbook which suggested that this was the case. He admitted that he had been unable to do so.

24 He did seek to rely on the case of *Rae* v. *Meek* (6). I have to say that I consider that this case, far from assisting him, is against him. It involved a claim by beneficiaries against trustees and against the lawyers appointed by the trustees for loss caused to the trust fund as a result of a negligent investment made by the trustees upon the advice of the lawyers. The

House of Lords held that the claim against the lawyers failed. Lord Herschell said this (14 App. Cas. at 568–569):

"My Lords, at the conclusion of the argument of the learned counsel for the appellants, all your Lordships were of opinion that they had failed to shew any ground for their action against the law agents. I share the difficulty which was felt by the Lord Ordinary . . . I cannot see how the law advisers could in any view be held liable to restore to the trust fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all, it could only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And, considering the contingent nature of the appellants' interest in the fund, it is obvious that this must be something very different from the amount of the loss to the estate. Liability as against the defenders, with whose case I am now dealing, could, in my opinion, only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that, having undertaken this employment, they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees, and not to the beneficiaries. If there has been a breach of it, the trustees and not the beneficiaries are the parties to sue. *There may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, the beneficiaries might compel them to do so, or even enforce the right themselves.* But no such question is raised by the averments in the present action." [Emphasis supplied.]

25 As can be seen, the general principle was clearly stated, namely that a claim against an agent appointed by the trustees lies with the trustees and not with the beneficiaries. However, Mr. Cadin relied upon the emphasized passage and argued that the House of Lords envisaged the possibility of the beneficiaries bringing a claim themselves against the defaulting agent. In my judgment, the emphasized passage is clearly a reference to the two possibilities which I described at para. 14 above. First, if a trustee fails to take action against a defaulting agent or delegate who has caused loss to the trust fund, the beneficiaries may institute an

administrative action seeking a direction from the court that the trustee should take proceedings against the agent. As an alternative, in special circumstances, the beneficiaries may institute a derivative action against the agent. However, in a derivative action, the claim is not brought by the beneficiaries as such. The beneficiaries stand in the place of the trustee and sue in right of the trust. They are not enforcing duties owed to the beneficiaries, rather duties owed to the trustee. A beneficiary can be in no better position than trustees carrying out their duties. I do not consider that

the passage supports the proposition that beneficiaries have a claim in tort against a defaulting agent for loss to the trust fund.

26 This is not to say that there may not be circumstances in which beneficiaries may have a claim against an agent of a trustee for economic loss suffered by the beneficiaries. Thus, if negligent advice by an agent is relied upon by a beneficiary in circumstances where the agent knows that this may be the case, a claim in accordance with the principles laid down in cases such as *Caparo Indus. Plc.* v. *Dickman* (2) may arise; and similarly an agent may in some circumstances be held to have assumed responsibility towards the beneficiaries such that a claim arises in accordance with cases such as *Henderson* v. *Merrett Syndicates Ltd.* (5) (see the discussion to this effect in *Lewin*, *op. cit.*, paras. 43–06 – 43–09, at 1787–1790). However, no such cause of action is pleaded in the present case.

27 Mr. Cadin raises the same three arguments as are described in paras. 14–19 above for submitting that the court ought to recognize the possibility of a claim in tort by beneficiaries directly against MA as an agent of the trustee. However, for similar reasons to those which I have expressed in relation to the trust claims, I do not consider that any of those three arguments leads me to conclude that it is even arguable that a duty in tort can arise save in these circumstances.

Conclusion

28 For these reasons, I allow the appeal, strike out the allegations against MA and discharge MA from the proceedings.

29 By way of postscript, I would make one additional observation on Mr. Cadin's point concerning the possible existence of a gap where no remedy would lie against BNP or MA because of the existence of the exoneration provision set out in para. 15. The plaintiff's case, as pleaded in the order of justice, is that MA was merely BNP's nominee. Thus, MA could only act upon the instructions of BNP; it had no independent discretion of its own. In these circumstances, it seems clear that any action of MA would in law be the responsibility of BNP, because BNP would have instructed MA to take the necessary action.

30 Even if, contrary to my view, there were any doubt about that, I note that the position has been reaffirmed in open correspondence, in that BNP has undertaken that all acts and omissions of MA or any of MA's personnel on MA's behalf connected with the matters in issue in these proceedings shall be treated as BNP's acts and omissions and BNP will be liable for those acts and omissions as principal, so long as such acts and omissions are found by the court to attract liability. Mr. Harvey-Hills specifically confirmed in the hearing before me that this remained the

position. It is therefore clear that the plaintiff will suffer no prejudice by the discharge of MA from the proceedings.

31 I emphasize, however, that this is not the reason for discharging MA. I have reached my decision on the simple ground that the order of justice does not disclose a reasonable cause of action against MA.

Appeal allowed.