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ROYAL COURT
(Samedi Division) 35

20th February, 1996

Before: The Judicial Greffier

Between	Claes Enhörning (Trustee in bankruptcy of Alsatia Förvaltnings Aktiebolag) (originally known as Aktiebolaget L. Bergström Finans)	Plaintiff
And	Nordic Link Limited	First Defendant
And	Kleinwort Benson (Jersey) Limited	First Party Cited And Second Defendant
And	Corporate Secretaries (Jersey) Limited	Second Party Cited And Third Defendant
And	Terence Bowman	Third Party Cited And Fourth Defendant
And	Gerrard John Watt	Fourth Party Cited And Fifth Defendant
And	Peter Whiting	Sixth Defendant
And	Anthony Charles Cooper	Fifth Party Cited
And	Niklas Bergström	Sixth Party Cited
And	Leighton Private Hotel (1987) Limited	Seventh Party Cited
And	Leighton Private Hotel Limited	Eighth Party Cited
And	Queen's Hotel (Jersey) Limited	Ninth Party Cited
And	Leeward Bearing Holding Company Limited	Tenth Party Cited
And	Kleinwort Benson International Trust Corporation	Eleventh Party Cited
And	Sten Raoul Lars Bergstrom (convened at the instance of the First to First to Sixth Defendants)	First Third Party

And	Lars Kurt Magnus Bergstrom (convened at the instance of the First to Sixth Defendants)	Second Third Party
And	Lars Jonas Bergstrom (convened at the instance of the First to Sixth Defendants)	Third Third Party
And	Sven Peter Jonsson (convened at the instance of the First to Sixth Defendants)	Fourth Third Party
And	Advokatfirman Carler I Helsingborg AB (convened at the instance of the First to Sixth Defendants)	Fifth Third Party

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Application for determination as a preliminary issue of whether the shares in a certain company were transferred at an under-value.

Advocate N.F. Journeaux for the Plaintiff;
Advocate J.P. Speck for the Defendants;
Advocate M. O'Connell for the First, Second and Third Third Parties;
Advocate A.D. Robinson for the Fifth Third Party.

JUDGMENT

THE JUDICIAL GREFFIER: On 1st February, 1996, I heard the application of the Defendants for the issue as to whether the transfer of the shares in Scandiaverken Trading AB by Alsatia Förvaltnings Aktiebolag (originally known as Aktiebolaget L. Bergström Finans) to Nordic Link Limited was at an under-value, to be determined as a preliminary issue pursuant to Rule 6/19 of the Royal Court Rules, 1992, as amended.

This action relates to an allegation by the Plaintiff that the Defendants conspired to defraud the creditors of Alsatia Förvaltnings Aktiebolag (hereinafter referred to as " Alsatia") by causing the shares in Scandiaverken Trading Aktiebolag (hereinafter referred to as "SKT") to be sold to the First Defendant at an under-value. The Plaintiff claims damages both by reason of the sale at an under-value and by reason of their

allegation that the value of the shares diminished whilst they were owned by the First Defendant. During the course of the proceedings the First Defendant agreed to transfer the shares back to the Plaintiff and this has occurred.

The Defendants' argument was that the issue as to whether the shares were sold at an under-value is fundamental to the Plaintiff's case and that if that issue were to be determined in favour of the Defendants then the whole of the action would fall away. Accordingly, in order to save time and costs, they applied for that issue to be determined as a preliminary issue. The Third Parties, not surprisingly, supported the Defendants in this contention. However, the Plaintiff opposed the application upon the basis that, although, if the issue were determined in favour of the Defendants, it would terminate the action, if it were to be determined in favour of the Plaintiff, it would be only one of a number of issues which would need to be determined in their favour if they were to succeed in full. The Plaintiff therefore submitted that it was not appropriate that the trial of the action be sliced up in this way.

Rule 6/19 of the Royal Court Rules, 1992, as amended, reads as follows:-

> *"Reference of questions to court before setting down for hearing*
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> *6/19. Where in any action on the pending list it appears to the Greffier that a question raised by a pleading should be determined before the action is set down for trial or hearing, he may refer such question to the Court and may give such directions as he deems appropriate for securing the attendance of the parties before the Court."*

The action was set down on the pending list as against the First Defendant only in late 1993 but since then additional Defendants and the Third Parties have been joined as parties to the action. In my view, although the original setting down Order has not been set aside, as the action has not been set down on the hearing list as against all parties I was able to exercise the power under Rule 6/19 notwithstanding the words contained therein, *"before the action is set down for trial or hearing"*.

However, if I am wrong in relation to this then I would be able to invoke the power under Rule 6/21(3), in relation to the part of the action which has been set down on the hearing list, which paragraph reads as follows:-

> *"(3) The Greffier may, at any time after an action has been set down on the hearing list, on application being made by any party, make an order -*

(a) that the issues between the parties be tried separately; and

(b) specifying the order and manner in which such issues should be tried".

In the case of Purdie v. Bailhache & Bailhache (1989) JLR 111 CofA, there is, commencing on line 26 of page 115, an interesting section which reads as follows:-

"Rule 6/19 of the Royal Court Rules, 1982 provides that -

"where in any action on the pending list it appears to the Greffier that a question raised by a pleading should be determined before the action is set down for trial or hearing, he may refer such questions to the Court...."

That rule seems to us to confer a wide discretion on the Greffier to order a preliminary issue to be tried. The comparable rule in England is 0.33, r.3 of the Rules of the Supreme Court. That invests the court with power to order a trial of questions of fact or law (or partly of fact and partly of law) before trial of the action. Previously, the earlier rule had restricted the preliminary issue procedure to questions of law only. The judicial protest against the practice of courts allowing preliminary points of law to be determined before trial, instead of first finding the facts, is not germane to the new procedural situation. The description of preliminary points of law as being (Tilling v. Whiteman ([1980] A.C. at 25) "too often treacherous short cuts" whose "price can be delay, anxiety and expense" is not apt to describe preliminary issues in which facts and issues of law are found by the courts within the framework of the separate trial. Nevertheless, some cautionary note needs to be sounded before the courts too readily indulge in carving up parts of an action. A single trial of all issues is the traditional mode of trial under the English system of litigation. And we do not think that, in essence, the general approach has been any different in this jurisdiction, although we are aware that, because of the size of the judiciary, the inclination to short-cut litigation has been more pronounced. We are comforted in coming to that conclusion by a decision of the Deputy Bailiff in Abdel Rahman v. Chase Bank (C.I.) Trust Co. Ltd. (1). In that case, an application sought an order that the hearing of the issues of the validity of a settlement should be adjourned pending determination by the court, whether the settlement was valid or invalid under the rule of Jersey law that donner et retenir ne vaut. The Deputy Bailiff cited two paragraphs from 37 Halsbury's Laws of England, 4th ed., Practice & Procedure,

paras. 483-484, at 366-367, and concluded from those paragraphs:

"It follows that, although separate trials of separate issues should be regarded as a departure from the norm and that exceptional circumstances or special grounds are required, I do have, within the exercise of my discretion, wide powers to order the separate trial of separate issues. If there are special grounds, it is indeed for the court to regulate its own procedure...."

We endorse that approach.

It is inherent in any court of law that it is invested with the power to decide for itself how to regulate its business. Two qualifications only must be made. First, the procedure must not in any way conflict with any statutory provision. Rule 6/19 positively invites the court to decide the mode of disposal of litigation; there is no limitation on separate trials of separate issues. Secondly, the court must ensure that in splitting the trial neither party thereby should enjoy an unfair advantage or suffer an unfair disadvantage (see Bayerrissche Ruckversicherung A.G. v. Clarkson Puckle Overseas Ltd. (2)). The order for a preliminary issue for must operate even-handedly."

The statement in the above section that the Court of Appeal is aware that, because of the size of the judiciary the inclination to short-cut litigation has been more pronounced in Jersey is relevant. I take it, therefore, that the intention of the Court of Appeal in Purdie v. Bailhache & Bailhache was that the statement that *"although separate trials or separate issues should be regarded as a departure from the norm and exceptional circumstances or special grounds are required"*, although setting out a correct approach, would nevertheless be applied in the light of the more pronounced inclination in Jersey to short-cut litigation.

In section 33/4/5 of the 1995 White Book, there are the following two helpful sections as follows:-

(1) *"An order for the separate trial of separate issues is a departure from the beneficial object of the law that all disputes should be tried together, and therefore, generally speaking, such an order should only be made in exceptional circumstances or on special grounds (per Jessel M.R. in Piercy v. Young (1880) 15 Ch.D. 475, pp.479, 480: per Scrutton L.J. in Bottomley v. Hurst and Blackett (1928) 44 T.L.R. 451, p.452).";* and

(2) *"On the other hand, these rules provide the machinery for avoiding the trial of unnecessary issues or questions, by isolating particular issue (sic) or questions for separate trial and thus eliminating or reducing delay and expense in the preparation and the trial of issues or questions which may ultimately never arise for trial or which otherwise warrant being separately tried. An order should therefore be made for the separate trial of a preliminary issue, e.g. a point of law, which if decided in one way is likely to be decisive of the litigation, and it is not necessary that the decision should be such as to dispose of the entire action whichever way it is decided (Carl Zeiss Stiftung v. Herbert Smith & Co. [1969] 1 Ch.93; [1968] 2 All E.R. 1002, C.A. approving the principle stated by Romer L.J. in Everett v. Ribbands [1952] 2 Q.B. 198, 206). Such an order may have the beneficial effect of expediting the hearing of the substantial issue in the action, eliminating the need for the discovery of documents and evidence on the other issues, and producing a substantial saving of costs.".*

In the case of Todman v. Black (1980) JJ 255 CofA, on page 262, there is a helpful section -

"Now it may be that the position as I have described it means that there is more of this case left to be decided at the adjourned hearing than was anticipated by the parties when they made their arrangement for the limited issue to be decided at the first hearing. It appears to me that the issue was indeed drawn in inconveniently narrow terms. There may often be an advantage in actions of this kind in asking the Court to deal first with the question of liability and subsequently, should it turn out to be necessary, to deal separately with the issue of damages. If that had been done in this case, it is clear that the Royal Court at the first hearing would have been concerned to decide not simply what the terms of the contract were but also what was the meaning of those terms and whether there had been a breach of the contract; and I think it desirable to say that while it is possibly convenient for parties to agree that the issue of liability in an action should be tried first, and separately from the issue of quantum, it is only rarely convenient for the issue of liability itself to be separated into preliminary and subsequent issues."

In relation to this action the proposed preliminary issue will, as I have already said, dispose entirely of the action if decided in favour of the Defendants. However, if it is not then there will be a major problem inasmuch that the evidence which will have to be heard in order to determine a preliminary issue will be evidence which will have to be heard in order to determine

the full quantum of the under-value at the date of the transfer. Even though the shares have subsequently been transferred, the quantum of the under-value at the date of the transfer will be relevant to the present measure of damages if, as alleged by the Plaintiff, the value of the shares dropped during the period when they were owned by the First Defendant. During the course of the hearing, Advocate Speck, in response to this difficulty, suggested that this could be dealt with by the issue being broadened out to a determination of the quantum of the under-value. However, the difficulty with this is that, in addition to proving the sale at an under-value, in order to succeed, the Plaintiff will have to show knowing or dishonest assistance or conspiracy as a second issue and the issue of the loss suffered is the third issue to be determined in order to establish the full claim. What Advocate Speck was therefore suggesting was that the Court determine at the same time the first and the third issues leaving over the second issue. That cannot be a satisfactory way in which to proceed.

It seemed to me that one of the factors which I ought to take into account was the question as to how clear cut and self-contained the preliminary issue is. In the Todman case the criticism of the Court of Appeal was, amongst other things, that the preliminary issue determined was not sufficiently separate from other issues. In the Rahman case which is mentioned in the Purdie Judgment the issues of the validity of the marriage and of the questions as to whether the settlement was a sham and therefore contravened the *donner et retenir ne vaut* rule were each self-contained issues. In this case, as I have mentioned before, the issue of the sale at an under-value and the issue of the quantum of the under-value are closely related from an evidential point of view.

In this action there are also other issues which will be liable to seep into a hearing of the preliminary issue. For instance, the Plaintiff will want to bring evidence which tends to show that the Defendants behaved subsequently in a way that suggested a conspiracy or a cover up as this would tend to show that they thought that the sale had taken place at an under-value. If such evidence were to be allowed in by the Court, and it might well be allowed, upon the basis *inter alia* that to disallow it would be to put the Plaintiff at a disadvantage, then there will be an overlap between the issue of knowing or dishonest assistance or conspiracy and the issue of the sale at an under-value.

It also seemed to me that in exercising my discretion I should be prepared to take into account the matter of the length of the preliminary issue as a percentage of the whole case. Clearly, if a preliminary issue were to be 90% of a whole case then there would be very little practical advantage in it being determined as a preliminary issue. Advocate Journeaux submitted that the preliminary issue would take up 60% or 70% of the trial but Advocate Speck submitted that it would take up much less than

this. In my view, it will take less than 60% or 70% of the trial but will, nevertheless, take up a substantial part of the trial and I would estimate that it will take between 30% and 40% thereof. It seems to me that one of the disadvantages with a case being sliced up into separate issues is that delays are inherent in this process. The Rahman action was a classic example of this because each preliminary issue once determined was appealed. The Court did not go on to the next preliminary issue until appeals had been determined.

It therefore seemed to me that in this case in exercising my discretion I was having to consider, on the one hand, a substantial saving of Court time and costs if this preliminary issue were to be determined in favour of the Defendants and, on the other hand, a substantial degree of duplication and delay if it were not.

However, returning to the test set out in the cases of Purdie v. Bailhache & Bailhache and Todman v. Black I had to ask myself the following questions:-

(1) from Purdie, are there exceptional circumstances or are there special grounds, allowing for the Jersey Courts being more inclined towards the ordering of a preliminary issue, for a preliminary issue to be ordered; and

(2) from Todman v. Black, is this one of those rare cases where it is convenient for the issue of liability to be separated into preliminary and subsequent issues.

In the exercise of my discretion in this matter I found that the answer to both these questions was no and, accordingly, I dismissed the application for the ordering of the determination of the preliminary issue.

I then went on to determine the issue as to who should pay the costs and decided that the Defendants should pay their own costs and those of the Plaintiff and that, as the Third Parties had supported the Defendants in relation to the application, they should bear their own costs of and incidental thereto.

Authorities

Royal Court Rules 1992: Rule 6/19, 21(3).

Purdie -v- Bailhache and Bailhache (1989) JLR 111 CofA.

R.S.C. (1995 Ed'n): 33/4/5.

Todman -v- Black (1980) JJ 255 CofA.

Rahman -v- Chase Bank (1987-88) JLR 81.

4 Halsbury 37: pp.366-369.

Barreto -v- Sanguy (2nd May, 1990) Jersey Unreported: (1990) JLR N.11.

Broad Street Investments (Jersey) Ltd -v- National Westminster Bank (1985-86) JLR 6.

Tilling -v- Whiteman (1979) 1 All ER 737 (HL).