**SAINT CHRISTOPHER AND NEVIS**

**IN THE COURT OF APPEAL**

**HCVAP 2008/004**

**BETWEEN:**

**CRAIG REEVES**

Appellant

and

**PLATINUM TRADING MANAGEMENT LIMITED**

Respondent

**Before:**

The Hon. Mr. Denys Barrow, S.C — Justice of Appeal

**On paper:**

Mr. Mark Brantley and Ms. Dahlia Joseph for the Appellant
Mr. Frank Walwyn and Ms. Midge Morton for the Respondent

2008: May 30;

*Civil Procedure – Procedural Appeal*

*Case management powers - trial of preliminary issue of law – trial of preliminary issue of fact – rules 26 and 27 of the Civil Procedure Rules 2000 (CPR 2000)*

The respondent, a company incorporated in Nevis, brought a claim against the appellant, a 49% shareholder and director of the company, alleging breaches of a number of statutory and fiduciary duties, alleging tortious conduct and claiming damages and an injunction. Contemporaneously with the filing of this claim, the respondent removed the appellant as director and redeemed his shares. The respondent then amended its claim to make the issues of the share redemption and valuation part of its claim. Before the appellant had filed a defence in the claim, the respondent filed a notice of application ("the Redemption Application") seeking an order and declaration that the appellant's shares had been validly redeemed and that all of the respondent's obligations to the appellant in connection with his former shareholding interest had been satisfied. The order and declaration sought on the Redemption Application were the same order and declaration sought in the amended claim.The appellant filed procedural objections to this application. Directions, including the fixing of a date, were given for the hearing of the Redemption Application without deciding on the objections; against which decision the appellant appealed.

**Held,** allowing the appeal, setting aside the decision to hear the Redemption Application and awarding costs to the appellant:

(1) The Redemption Application was not simply a scheduling decision, but was equivalent to an application for the trial of a preliminary issue. An order for the separate trial of an issue is within the range of case management orders that the court may make. Generally, such an order should be made at the case management conference fixed following the filing of the defence and must only be made following a careful consideration of the risks.

**Allen v Gulf Oil Refining Ltd.** [1981] AC 1001 applied.

(2) There are three types of orders that can be made: for the trial of a preliminary issue on a point of law; for the trial of preliminary issues or questions of fact; and for the separate trial of issues of liability and quantum. The order for the hearing of the Redemption Application was an order for the trial of preliminary issues or questions of fact.

(3) To order the separate trial of a question or issue of fact was an extraordinary and exceptional course which should only be made on special grounds. No such special grounds were shown. The decision to order the trial of these preliminary issues was accordingly wrong.

**Piercy v Young** (1880) 15 CH D 475 which considered **Emma Silver Mining Co. v Grant** (1875) 11 Ch D 918 applied.

(4) The learned judge erred in principle by failing to consider or properly consider the reasons why a trial of such preliminary issues should not be held and as such, the decision to hold the trial of a preliminary issue was bad in law.

**Dufour v Helenair Corporation Ltd.** [1996] ECLR 95 followed.

**JUDGMENT**

[1] **BARROW, J.A.:** On 11th April 2008 Leigertwood–Octave J made an order for directions, including fixing a date, for the hearing of an interim application by the respondent (hereafter "Platinum"), which involves the early trial of substantive issues in the claim. The appellant (hereafter "Reeves") contends the decision was "so aberrant that no reasonable judge could have reached it." Reeves accordingly asks, on this procedural appeal, for the judge's order to be set aside.

**The claim and the application**

[2] The underlying claim was brought by Platinum against its former 49% shareholder and director, Mr. Craig Reeves, originally alleging breaches of a number of statutory and fiduciary duties, alleging tortious conduct, and claiming damages and an injunction. The issue on this appeal stems from the fact that almost contemporaneously with the filing of its original claim Platinum removed the appellant as a director and redeemed his shares. Platinum had Reeves' shares valued and has paid US$3.5 million into court as the value of those shares. Platinum then amended its claim to make the issues of the share redemption and valuation part of its claim. Reeves vigorously disputes the validity of his removal and the redemption of his shares as well as the reliability of the valuation of the shares.

[3] As part of the amended claim that Platinum brought against Reeves it sought, among other things, "[a]n Order and Declaration that Reeves' shares in PTM [Platinum] have been validly redeemed effective 21 May 2007 for the redemption price of US$3,500,000" and "[a]n Order and Declaration that upon payment into Court of the redemption price of US$3,500,000, all of PTM's obligations to Reeves in connection with his former shareholding interest in PTM have been satisfied"

[4] On July 13, 2007 Platinum filed a Notice of Application seeking "[a]n Order and Declaration that the shares in PTM formerly held by the Defendant/Respondent Craig Reeves ("Reeves") have been redeemed effective 21 May 2007 for the redemption price of US$3,500,000, and that all of PTM's obligations to Reeves in connection with his former shareholding interest in PTM have been satisfied." This application will be referred to as the "Redemption Application". As counsel on both sides agree, Platinum seeks on the Redemption Application the same order that Platinum seeks in its substantive claim.

[5] After a number of interlocutory battles the claim came back before the judge on 11 April 2008 on the hearing of an application by Platinum seeking directions for the hearing of the Redemption Application. The judge then gave directions to the following effect:

(i) The Hearing of the Redemption Application is set for May 15 and 16, 2008.

(ii) The parties are at liberty to file additional evidence by April 25, 2008.

(iii) The Claimant to file submissions by April 29, 2008.

(iv) The Defendant to file responding submissions by May 9, 2008.

(v) The Claimant to file reply submissions by May 14, 2008.

[6] At the time Platinum filed the Redemption Application and even at the time the judge gave the directions for its hearing, Reeves had not yet filed a defence to the claim.[1] The case management conference required by rule 27.3 (1) of the **Civil Procedure Rules 2000** (**CPR 2000**) to be fixed by the court office immediately upon the filing of a defence, had therefore not been held.

**The objection to hearing the Redemption Application**

[7] Mr. Reeves opposed Platinum's application for directions on its Redemption Application on the following grounds:

(i) The relevant facts were in dispute and therefore the question of the redemption was not one of pure law and was not suitable to be dealt with by the court summarily without a trial.

(ii) To adequately deal with the Redemption Application the learned judge would be required to engage in a mini-trial, which the authorities have established ought to be guarded against; and

(iii) The application for directions was premature as Mr. Reeves' defence was not yet due to be filed.

[8] The affidavit of Craig Reeves filed on November 22, 2007 and the skeleton submissions filed on behalf of Reeves on November 23, 2007, both addressed Reeves' preliminary objections to the court hearing Platinum's Redemption Application. According to the written submissions of counsel for Reeves on this appeal, these documents were relied upon by

[1] According to Platinum's submissions, Reeves did so subsequently, on 15 April 2008

counsel at the hearing for directions on Platinum's Redemption Application. As will shortly appear, Platinum is insistent that the judge did not decide upon the preliminary objections.

[9] According to the affidavit and submissions relating to this appeal filed on behalf of Reeves, the judge held that it was appropriate for the court to deal with the matter of the redemption and valuation of Reeves' shares and that the court could carry out a full investigation of the matter on affidavit evidence. According to these submissions the judge was of the view that Parts 25 and 26 of the Civil Procedure Rules give the court wide case management powers pursuant to which the Court may "pull out an issue" to be tried separately. The submissions also stated that the judge commented that it was relevant that the issue of the redemption and valuation of Mr. Reeves' shares was unrelated to the other relief sought on Platinum's Amended Statement of Claim and the court need not wait on the filing of the defence to deal with the Redemption Application.

[10] The submissions on appeal on behalf of Reeves very fully addressed each of the three objections summarised in paragraph [7], above. However, it is not necessary to consider these submissions in any depth because of the position that counsel for Platinum took in their opposing submissions on this appeal. Counsel for Platinum repeatedly contended that Reeves' objections to the judge hearing the Redemption Application were premature, that Reeves had made these objections as a "Procedural Objection" in written submissions filed as long ago as November 2007, that the judge did not consider these objections on the directions hearing and that it would be open to Reeves and appropriate for him to make these objections when the Redemption Application comes on for hearing and not before.

**Were the objections premature?**

[11] The following paragraphs from Platinum's submissions state the essence of its contention that Reeves' objections to the hearing of the Redemption Application were premature:

> "1. … The Respondent respectfully submits that, by setting a timetable, the Judge below properly fulfilled the Court's duty to control its own process and actively manage cases."

> "2. As is further set out below, there is a high threshold for interfering with case management decisions. The threshold should be all the higher where the case management decision is simply one to set a schedule. If the Court accedes to the Appellant's submissions here, it will have a precedent setting effect whereby any litigant wishing to delay a hearing will simply appeal scheduling decisions as being substantive legal decisions. As is seen from the Notice of Application for the 11 April 2008 appearance, this was not meant to be a substantive appearance. The substantive appearance will be at the hearing of the Redemption Application itself. The issues raised in this Appeal are clearly premature and the Appeal ought to be dismissed."
>
> "3. The issues are premature because the Appellant's arguments on appeal (based on the English cases of Swain v. Hillman, Three Rivers and Doncaster Pharmaceutical) are the same arguments he seeks to advance under the rubric of a "Procedural Objection" in materials he filed on the Redemption Application in November 2007. Due to the delays that the Appellant has created (of which this appeal is the latest), the Honourable Judge below has not heard the Redemption Application nor properly been asked to consider the "Procedural Objection". While the Respondent accepts that the Appellant's Procedural Objection may properly be advanced at the outset of the Redemption Application, it is most improper to have this Honourable Court determine that Procedural Objection now before the Court below has done so on a properly constituted record. (Emphasis added.)"
>
> "4. Although we briefly address the Appellant's Procedural Objection in our submissions below, we do so only to illustrate for the Court the prematurity of this appeal. We took a similar precautionary step at the Court below by filing submissions in response to the submissions the Appellant had filed the day before the 11 April 2008 appearance. As matters unfolded, however, the Scheduling Application was resolved on pure case management principles and without much heed being paid to the written submissions."
>
> "5. As such, it is submitted that the proper issue before this Court is one and one alone; was Madam Justice Leigertwood—Octave entitled to set the timetable that she did? PTM respectfully submits that the decision to schedule steps for the hearing of the Redemption Application was a discretionary one and, as the Appellant admits, was made in the exercise of Her Ladyship's case management powers. Notwithstanding his twenty-three grounds and sub-grounds of appeal, the Appellant has presented no compelling reason for interfering with that discretion or disturbing the directions, As such, it is respectfully submitted that the appeal should be dismissed."

[12] In responding to each of Reeves' arguments against the judge's decision to hear the Redemption Application counsel for Platinum repeatedly stated the position that Reeves should advance his arguments to this effect when the redemption Application comes on for hearing and that it was premature to advance these arguments at this stage.[2]

[2] See paragraphs 3, 4, 10, 11, 20, 33, 35, 37, 52 and 54 of Platinum's submissions.

**Case management discretion**

[13] Platinum is on good ground with its submission that a judge has a wide discretion in managing the course of a trial. Active case management by the court remains one of the most important of the innovations that **CPR 2000** introduced. I agree with counsel for Platinum that it would be a bad precedent for this court to allow a litigant wishing to delay a hearing to succeed in doing so by appealing a scheduling decision of a judge as if it were a substantive legal decision. However, this was not simply a scheduling decision. This was, in effect, a decision to conduct a trial of a substantive issue between the parties, which was principally an issue of fact, at a point even before the first case management conference would have been held. Counsel for Platinum specifically acknowledged this reality by pointing to the power to do so contained in rule 26.1 (2) (e), which says the court's general powers of case management include the power to "direct a separate trial of any issue".[3]

[14] It was an unusual way to proceed. While an order for the separate trial of an issue is entirely within the range of case management orders that the court may make, such an order should normally be made at the case management conference fixed following the filing of the defence. Counsel for Platinum has sought to show why the judge may have felt justified in making the order at that stage and, perhaps as a matter of discretion and as a matter of timing, it was open to the judge to consider making the order at this point.

[15] Beyond the factor of timing, however, the Redemption Application was an exceptional application. Counsel for Reeves compared it to an application for summary judgment. I do not think that is the right comparison. An application for summary judgment is a request to the court to decide either that a claim or a defence has no real prospect of succeeding[4] and to bring the litigation (or the litigation on a particular issue) to an end at an early stage because there is no point in going to trial. Platinum does not seek by its Redemption Application to argue that Reeves' prospective defence was not maintainable. Rather,

[3] Paragraph 34 of Platinum's skeleton.
[4] Rule 15.2

Platinum seeks by its Redemption Application to have the court hold a trial, of two of the substantive issues that comprise the claim that Platinum brought, at a stage even before the defence is filed and so before disclosure of documents has taken place.

**Trial of a preliminary issue**

[16] In my view the Redemption Application was equivalent to an application for the trial of a preliminary issue. That is a procedure that the court employs when costs and time can be saved if decisive issues can be tried before the main trial. **Blackstone's Civil Practice 2006** indicates[5] there are three types of orders that can be made: (a) for the trial of a preliminary issue on a point of law; (b) for the separate trial of preliminary issues or questions of fact; and (c) for separate trials of liability and quantum. The net effect of the judge's order for the hearing of the Redemption Application was an order for (b) – the separate trial of preliminary issues or questions of fact. As the respective submissions indicate, among the issues the court will have to determine on the Redemption Application are whether Platinum acted in bad faith or for improper motive in amending its articles of association to introduce the power of the company to redeem the shares of a member against his opposition and what was the fair value of those shares.[6] These issues are fact-heavy.

[17] Wasting rather than saving time, complicating rather than simplifying issues, and engaging in mini-trials with no true justification for doing so, are among the risks that require careful consideration before a court decides to order the trial of a preliminary issue. Lord Roskill warned of the need to be "extremely cautious" before ordering the trial of a preliminary issue in **Allen v Gulf Oil Refining Ltd**.[7] in the following statement:

> "… your Lordships' House has often protested against the procedure of inviting courts to determine points of law upon assumed facts. The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But cases in which such

[5] 59.53
[6] See paragraph 38 of Platinum's submissions for a statement of the exercise the court would need to conduct on hearing the Redemption Application,
[7] [1981] AC 1001 at 1021-1022

> invocation is desirable are few. Sometimes a single issue of law can be isolated from the other issues in a particular case whether of fact or of law, and its decision may be finally determinative of the case as a whole. Sometimes facts can be agreed and the sole issue is one of law. But the present is not a case in which this procedure ought ever to have been adopted …"

After referring to the hopeless way in which the preliminary question had been formulated in the court below and the reformulation, at the appellate level, of the question that the House was asked to decide, Lord Roskill continued:

> "My Lords, in common with all your Lordships, I agree that this should be treated as the question to be answered. But I hope that your Lordships' agreement so to treat it will not encourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary points should be ordered, to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded upon pleas of supposed economy."

[18] It will be seen from the speech of Lord Roskill that the trial of a preliminary issue will usually be of a point of law, which can be isolated from any factual dispute, or may be made separately triable because facts are agreed. To order the separate trial of a question or issue of fact was described in the early case of **Piercy v Young**[8] as an "extraordinary and exceptional" course that should only be made "on special grounds". In that case Jessel M.R. gave as illustrations three instances, which he had given in the earlier case of **Emma Silver Mining Co. v Grant**[9]**,** where this exceptional order was properly made. The illustrations are contained in the following passage from the judgment in **Piercy v Young**:

> "Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds. Consider for a moment three illustrations I gave in Emma Silver Mining Company v. Grant [FN5], when I directed an issue to be tried. The first case was that of a lady who alleged that she was the legitimate child of somebody, and as such entitled to an account, but her legitimacy was denied. If the Plaintiff was legitimate, her right to an account was not contested, but the cost of taking the account would have been enormous, so that if I had directed the account in the first instance and decided the legitimacy afterwards, the whole costs would have been thrown away. Therefore it was essential to decide the question of legitimacy first. It was not a case really for directing an issue for the trial as distinguished from trying the action. If the case had come on in the regular way, the only question to be tried would have been legitimacy. It was expediting the trial

[8] (1880) 15 Ch. D. 475 at 480
[9] (1875) 11 Ch. D. 918

> on the only question that could be tried that could be tried… The two next cases were very peculiar. The one was an heir-at-law case, in which the Plaintiff was a pauper with a fishing action, a very special case indeed, and there was evidence--strong evidence, and it turned out to be satisfactory evidence--that the Plaintiff had no claim at all. I have no such evidence here. As I said before, I cannot tell by the affidavits who is right and who is wrong. There is a statement by one side met by a contradictory statement on the other side. One cannot say in this case that there is *primâ facie* evidence that the Defendant is right upon the issue, as there was in that case. The third case was still more remarkable, because it was not only a pauper plaintiff, but a pauper set up by other persons to sue on his and their behalf, and in that case no doubt it would have been an enormously expensive action to try. The simple question was whether he was a tenant of the manor or not. The Defendants produced the court rolls, and shewed that his name was not entered as tenant. There was the strongest *primâ facie* evidence that he was not tenant; I therefore thought it right first to put him to the proof that he was tenant, but he failed to prove it, and there was an end of the action. Here there is a conflict of testimony, and I have no means of forming an opinion as to which is right and which is wrong. I think that the application of the rule should be limited to extraordinary and exceptional cases, and I think the case of Emma Silver Mining Company v. Grant [FN6] was an extraordinary and exceptional case."

[19] It is very clear from the illustrations given by Jessel M.R. and the observations he made in giving them, as well as from the observations made by Lord Roskill, that it will indeed be an exceptional case in which a question of fact will be ordered to be tried in advance of the trial. In my view, to order in this case the separate trial of hotly contested issues of fact – the good faith of the redemption and the true value of the shares -- was extraordinary. In the absence of reasons from the judge and being satisfied, as I am, that the reasons for making the application given in the affidavit filed in support of the Redemption Application cannot amount to "special grounds", it seems to me the judge was wrong in principle in making the order for trial of the preliminary issues.

**Failure to consider relevant factors**

[20] Moreover, because the judge did not consider Reeves' Procedural Objection, it means the judge decided to hold a trial of preliminary issues of fact, as is the essence of the Redemption Application, without considering or properly considering the reasons why she should not hold such a trial. As Sir Vincent Floissac C.J. phrased it in a leading case from this court in this area of law concerning appeals from the exercise of judicial discretion,

**Dufour v Helenair Corporation Ltd.** [10], the judge erred in principle by failing to take into account or giving too little weight to relevant factors or considerations. That was fundamentally wrong and vitiates her decision.

[21] Implicit in Platinum's submission is that it remains open to the judge to consider the objections from Reeves at the beginning of the hearing of the Redemption Application. That course cannot redeem the judge's failure to consider Reeves' objection, because she has already decided to hear the application which would really be the trial of the claim for a final declaration and a final order. The judge needed to have considered the objection before deciding to hold such a trial.

[22] No doubt, as a matter of possibility, Reeves may be able to persuade the judge on the commencement of the hearing of the Redemption Application not to proceed with the hearing. That, however, is an unfair situation in which to place a litigant because compliance with the judge's directions for the hearing would mean that, preparations for the scheduled hearing having already taken place, on the day of the hearing the court may be (even if unconsciously) predisposed to proceeding with a hearing that has already been prepared for. If, on the other hand, the objector were to succeed in persuading the judge not to proceed with the scheduled hearing there would be a significant waste of time and money. It would be a waste to have, in attendance for cross-examination (which counsel for Reeves informed the judge they would require[11]), a number of witnesses from abroad, including the present majority shareholder of Platinum and Reeves, both of whom live or are based in England, their respective experts in valuing shares, and their respective English legal advisers whom the record shows are instructing local counsel.

[23] Besides those responses to Platinum's submission, the fundamental position remains as I have concluded: because the decision to hold the trial of a preliminary issue was taken in disregard of relevant factors, it was bad in law. In the circumstances of this case Reeves is

[10] Dufour v Helenair Corporation Ltd [1996] E.C.L.R. 95 at 97 B
[11] See paragraph 49 of Platinum's submissions

entitled, without more, to have the judge's decision quashed on appeal. He is not required to persuade the judge to set aside a bad decision.

[24] Therefore, I allow the appeal and set aside the decision to hear the Redemption Application. I award costs of this appeal to Reeves, to be assessed, if not agreed within 21 days.

**Denys Barrow, SC**
Justice of Appeal