

No Special
Consideration

BETWEEN THE PUBLIC SERVICE INVESTMENT
SOCIETY LIMITED Appellant

A N D MALCOLM STANLEY LAW,
BERTRAM WITAKER MARTIN
AND MARAMA ISOBEL MARTIN,
THOMAS PHILIP WALLACE,
MARGARET AILSA BARTON,
PIER SYBREN DOKTER AND
ALISON CHRISTINE DOKTER
Respondents

Coram: Cooke J.
Richardson J.
Somers J.

Hearing: 9 March 1981

Counsel: W.S. Shires Q.C. and Miss C. Matthews
for Appellant
J.T. Eichelbaum Q.C. and M. Skinner
for Respondents

Judgment: 7 April 1981

JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

Section 6(1)(a) of the Public Service Investment Society Management (No. 2) Act 1979 materially provides that after the commencement of the Act - it is deemed to have come into force at 9pm on 28 June 1979 - "... no person shall, - (a) bring or continue any action or other proceedings ... against any body corporate to which the Act applies". Exceptions included in that provision have no application to the present case. The Act applies to the appellant, the Public Service Investment Society Limited (PSIS).

Section 6(2) of the Act provides as follows -

"(2) Notwithstanding the provisions of
 "subsection (1) of this section, an action
 "or any proceedings may be brought against
 "any body corporate to which this Act applies
 "for the purpose of determining whether any
 "right or liability exists if the leave of the
 "statutory manager of that body corporate or
 "of the Court has first been obtained."

Provided the action or proceedings are for the stipulated purpose that subsection confers a discretion upon the Court which is unfettered in terms. That does not mean it may be exercised in an arbitrary way. The principles governing its exercise are the requirements imposed by the justice of the case.

In the present case the respondents, variously described as intending first, second, third, fourth and fifth plaintiffs, together moved for leave to commence an action against the PSIS. The Chief Justice gave such leave on 26 November 1980 and from that determination the PSIS appeals.

PSIS owns a property at Hobson Street, Wellington upon which is erected a building containing some 84 flats or units. They are all occupied and PSIS intends that a body corporate will be formed under the Unit Titles Act 1972 to which the land and buildings will be leased for 99 years. The rights of the occupiers to their several units would therefore be temporally limited. Those having occupational rights to 36 of the flats or units maintain a claim to a stratum estate in freehold and desire that claim to be determined by the Courts. The occupiers of five of the 36 units are the intending plaintiffs and the respondents to this appeal. Mr Law, the first named of them, has deposed that he believes that many of the other cases are identical in principle.

After the filing of the plaintiffs notice of motion for leave a statement of claim was lodged. It was not referred to in the evidence given upon affidavit but the course of the proceedings has been such that the issues before this Court are to be determined upon the footing that the statement of claim is in the form to be used if leave is given. As the relief sought by the several plaintiffs is a declaration as to the nature or quality of the contractual rights of the plaintiffs against PSIS the proposed action is of a type to which s.6(2) applies.

The statement of claim shows that the intended action is really five separate actions separately pleaded - one by the occupier or occupiers of each of the five units. The issue before the Court arises from that fact.

Rule 59 of the Code of Civil Procedure provides as follows -

"All persons may be joined in one action as
 "plaintiffs in whom any right to relief in
 "respect of or arising out of the same
 "transaction or event, or series of transactions
 "or events, is alleged to exist, whether jointly,
 "severally, or in the alternative, where if such
 "persons brought separate actions any common
 "question of law or fact would arise; provided
 "that if, upon the application of any defendant,
 "it shall appear that such joinder may embarrass or
 "delay the trial of the action, the Court or a Judge
 "may order separate trials, or make such other order
 "as may be expedient, and judgment may be given
 "for such one or more of the plaintiffs as may be
 "found to be entitled to relief, for such relief
 "as he or they may be entitled to, without any
 "amendment. But the defendant, though unsuccessful,
 "shall be entitled to his costs occasioned by so
 "joining any person who shall not be found entitled
 "to relief, unless the Court or a Judge, in disposing
 "of the costs, shall otherwise direct."

Ordinarily the question of whether a joinder is properly made falls to be determined after the commencement of an action upon application by the defendant to strike out

or stay the same. Sometimes the statement of claim will be sufficient to demonstrate whether joinder is permissible: see e.g. Scott v Hopkins [1918] G.L.R. 589; Morgan v Taranaki Farmers' Meat Co. [1925] N.Z.L.R. 513. But often no decision can be made until the defendant has pleaded: see Payne v British Time Recorder Co. Ltd [1921] 2 K.B. 1, 5. The present case is not a defendant's application claiming misjoinder but a plaintiff's application for leave to bring an action in the form predicated by the statement of claim. And it is on that application that PSIS claims that the action proposed will not be properly constituted and that accordingly leave should not be granted or not be granted unconditionally.

When application is made for leave to bring an action the Court must be satisfied that the contemplated proceeding is one which is warranted by the statute requiring that leave - in this case we have already indicated that the proposed action is of a kind to which the enactment applies. The procedural rules of the court stand upon a different footing. No action has been commenced and any conclusive determination of issues related to such matters must await its commencement or even the completion of the pleadings. That is not to say the rules have no impact before action is begun. What is proposed to be done must at least prima facie comply with the rules. And so it is with questions as to the propriety of an intended joinder under R.59. We are of opinion that on an application of the present type the concern of the Court as to compliance with R.59 need go no further than being satisfied that on the material before it there are reasonable grounds to suppose the joinder is proper. It is on that basis that we approach the present case. We shall later refer to the right

of an intended defendant to have the issue conclusively determined if the case should require it.

Before the Chief Justice Mr Shires Q.C., of counsel for PSIS indicated that no objection would be raised to leave being given to each plaintiff to commence a separate action and submitted that leave should be conditioned upon a severance of the several claims and upon the added condition that certain averments be pleaded with further particularity. He repeated that submission in this Court. Section 6(2) does not expressly refer to the imposition of conditions upon the grant of leave and as the existence of the suggested power is not crucial in this case and no argument was addressed to this Court on the point it is neither necessary nor desirable to decide it. But it may at least be said that on an application such as the present it is within the competence of the Court to give leave to one or more of the proposed plaintiffs to the exclusion of another or others, and that there could be no objection, if the course were thought proper, to an intimation that subject to stipulated amendments to the suggested pleadings touching on matters connected with the issue of joinder leave would be given.

As an alternative however Mr Shires submitted both to the Chief Justice and in this Court that the intended action evidenced by the affidavit of Mr Law and the statement of claim was one in which the plaintiffs could not properly join in terms of R.59. And that became the substantial issue in this Court.

In the context of this case some general, but by no means exhaustive, observations on the scope of R.59 are

called for. (1) Its first, and enabling, part contains two conditions for a warranted joinder. The right to relief averred to exist in each plaintiff must be

"in respect of or arising out of the same
 "transaction or event, or series of
 "transactions or events, ... whether
 "jointly, severally, or in the alternative".

And the case must be one where if such plaintiffs brought separate actions a "common question of law or fact would arise".

(2) The purpose of the rule being to prevent a proliferation of actions it is to be construed liberally: Payne's case [1921] 2 K.B. 1, 16; Oesterreichische Export A.G. vorm A Janowitz v British Indemnity Insurance Co. Ltd [1914] 2 K.B. 747, 755.

(3) The rule relates not only to joinder of plaintiffs but also deals with joinder of causes of action: Compania Sansinena de Carnes Congeladas v Houlder Brothers & Co. [1910] 2 K.B. 354, 365; Oesterreichische case [1914] 2 K.B. 747, 765.

(4) There will be many cases in which the fact that the right to relief claimed to exist in each plaintiff arises out of the same or a series of transactions or events will establish en route the second condition, the existence of a common question of law or fact. Drincqbier v Wood [1899] 1 Ch. 393 is such a case - see particularly the arguments at pp395-396 and per Byrne J. at 397.

(5) The condition, "any common question of law or fact would arise", predicates that such question will arise but does not seek to quantify its relevant importance or significance. It is enough that correspondence to whatever degree exists. But the qualitative significance of the common question is of importance where the defendant applies to set aside a joinder under the proviso to R.59: Payne's case [1921] 2 K.B. 1, 11, 13, 16; Morgan's case [1918] G.L.R. 589, 590.

With that introduction we can turn to the present case. Mr Shires conceded that the right to relief claimed by the several plaintiffs arose out of the same series of transactions or events. In a case like the present that absolves the Court from further enquiry into the point. But he submitted that no common question of law or fact would arise if actions were brought separately by each plaintiff. That submission involves a consideration of the statement of claim and the evidence.

The statement of claim as it relates to the first plaintiff is as follows -

"1. THE defendant is a body corporate
"duly registered under the Industrial and
"Provident Societies Act 1908.

"2. AT all times material to this action
"the defendant was the owner of certain land
"in Hobson Street, Wellington on which was
"erected a building known as Hobson Court
"containing some 84 apartments.

"3. ON or about 5 March 1976 the plaintiff
"entered into an agreement in writing with
"the defendant which now bears the date
"25 November 1977.

"4. IN such agreement the plaintiff was
"described as the purchaser of 25,925
"ordinary \$1 shares in Hobson Court Flats
"Ltd the ownership of which shares were to
"allow the purchaser to obtain an occupation
"contract for the flat unit described as
"Flat 2, Level 4 in Hobson Court the purchase
"price being \$25,925.

"5. THE agreement was in the form annexed
"hereto marked 'ACD'.

"6. AS agreed between the plaintiff and
"the defendant, the plaintiff paid the
"defendant a portion of the purchase price
"in cash, and the defendant advanced the
"balance on the terms set out in the agreement.

"7. SUBSEQUENTLY, by way of variation of the
"agreement, the plaintiff and the defendant agreed
"that in place of shares in Hobson Court Flats Ltd
"and an occupation contract, the plaintiff would

"receive and accept a unit title to
 "the flat under the Unit Titles Act 1972.

"8. BY way of further variation of the
 "agreement, the plaintiff and the defendant
 "subsequently agreed that the title to be
 "issued to the plaintiff would include a
 "car parking space in the grounds of Hobson
 "Court.

"9. THE plaintiff has performed and/or is
 "ready and willing to perform when required
 "the obligations imposed on him under the
 "agreement.

"10. THE defendant proposes to issue to the
 "plaintiff by way of title to the flat unit
 "and accessory unit, a title to a stratum
 "estate in leasehold. The defendant proposes
 "that the body corporate to be formed under
 "the Unit Titles Act 1972, shall have a lease
 "of the land for a term of 99 years without
 "right of renewal at a rental based on the value
 "of the land and subject to periodic reviews
 "of rental throughout the 99 year term.

"WHEREFORE the first plaintiff claims against
 "the defendant:

"(a) A declaration that the defendant is obliged
 "to issue to the first plaintiff by way of title
 "to the flat unit and accessory unit for car
 "parking space, a title to a stratum estate
 "in freehold; ..."

(Prayers for ancillary relief are omitted.)

The agreement ACD referred to in para 5 of
 the statement of claim is as follows -

"AN AGREEMENT made this day of 1979
 "BETWEEN THE PUBLIC SERVICE INVESTMENT
 "SOCIETY LIMITED (hereinafter called
 "'the Society') of the one part and the
 "purchaser named and described in the
 "Schedule hereto (hereinafter called
 "'the Purchaser') of the other part
 "WHEREAS the Society has agreed to sell
 "and the Purchaser has agreed to purchase
 "the number of shares in HOBSON COURT FLATS
 "LIMITED detailed in the Schedule hereto
 "(hereinafter called 'the Shares') for the
 "purchase price stated in the Schedule hereto
 "(hereinafter called 'the purchase price')
 "the ownership of which shares allows the
 "purchaser to obtain an Occupation Contract
 "for the flat unit in Hobson Court Flats

"described in the schedule hereto
 "(hereinafter called 'the flat')
 "AND WHEREAS the Society has agreed
 "to lend and advance by way of mortgage
 "over the shares and the Occupation
 "Contract of the flat the principal sum
 "stated in the schedule hereto (hereinafter
 "called 'the principal sum') such principal
 "sum is to bear interest at the rate stated
 "in the schedule hereto and to be repaid by
 "the regular payments stated in the schedule
 "hereto within the term stated in the
 "schedule hereto

"NOW THEREFORE the purchaser hereby agrees
 "with the Society as follows:-

"1. That the purchaser will take possession
 "of the flat on the date stated in the
 "schedule hereto as the date of possession
 "and on that date the purchaser will pay all
 "outgoings payable in respect of the
 "occupation of the said flat and in respect
 "of the ownership of the said shares.

"2. The principal sum being advanced to the
 "purchaser shall be deemed to be advanced
 "on the date of possession and interest
 "payable on the principal sum shall commence
 "on the date of possession.

"3. The purchaser will pay the purchase price
 "less any deposit paid and less the principal
 "sum to the Society's solicitors on or before
 "the date of possession.

"4. The purchasers will repay to the Society
 "the principal sum together with interest
 "thereon computed at the higher rate stated
 "in the schedule hereto (reducible to the
 "lower rate stated in the schedule hereto)
 "as follows:-

"(a) By four weekly instalments of the amount
 "stated in the schedule hereto the first
 "payment being due four weeks after the date
 "of possession and thereafter on each and
 "every fourth successive week until the due
 "date of the mortgage as stated in the schedule
 "hereto

"(b) By payment on the due date of the mortgage
 "of the balance of the principal sum and
 "interest then remaining due and owing hereunder.

"5. The purchasers will at any time before
 "repayment of the principal sum upon demand
 "and with intent to create an equitable
 "mortgage of and to charge the shares and
 "Occupation Contract as security give and
 "execute in favour of the Society a good
 "and valid first mortgage of the shares and
 "Occupation Contract to secure repayment of

"the principal sum and interest thereon at
 "the rate and in the manner and at the times
 "aforesaid together with further advances
 "the said mortgage to be in such form and
 "to contain such covenants conditions
 "provisions and powers as are usually inserted
 "in mortgages of shares and Occupation Contracts
 "to the said Public Service Investment Society
 "Limited.

"6. In consideration of the Society giving
 "possession of the flat to the purchasers on
 "the date of possession herein stated the
 "purchasers will when requested so to do by
 "the Society or its representatives execute
 "any contract, agreement, share transfer,
 "Occupation Contract or other document to
 "affect the sale by the Society to the
 "purchaser of the shares and flat unit
 "referred to in the schedule hereto.

"7. The purchaser shall upon demand pay all
 "costs in respect of this agreement, the
 "purchase of the said flat and the preparation
 "and completion of the mortgage of shares and
 "Occupation Contract and all stamp duty and
 "other disbursements property payable on such
 "documents.

"8. It is hereby further agreed that the title
 "'The Public Service Investment Society Limited'
 "herein appearing shall be deemed to include and
 "bind the Public Service Investment Society
 "Limited and any subsidiary Company or Body
 "Corporate thereof."

(The schedule is omitted.)

The pleading of each of the third and fourth plaintiffs is in identical terms to that of the first plaintiff save that the respective dates of the agreements (cf. para 3 of the statement of claim) are 8 March 1977 and 10 December 1976 and the case of each refers to different units, price, and number of shares (cf. para 4 of the statement of claim). The agreement ACD is the same in all three cases except for the schedule.

The variation of agreement pleaded in para 7 of the claim of the first plaintiff and repeated in the same words in the case of the third and fourth plaintiffs is not

particularised. We were told by Mr Eichelbaum, and it was not disputed, that it resulted from a proposal by PSIS made in the form of a circular accepted by the plaintiffs and returned to PSIS. Its general effect was said to vary the agreement ACD by substituting for the reference to a purchase of shares a reference to the purchase of a flat unit and to that extent, as will be seen, putting the subject matter of the sale on the same footing as that of either the second or the fifth plaintiffs - the difference will become apparently shortly.

The pleading of the second plaintiff differs from that of the first third and fourth plaintiffs in four respects. (1) The date of the agreement with PSIS and the details of the flat or unit and its price; (2) the nature of the agreement is described not as a purchase of shares as in para 4 of the first plaintiffs claim but as follows -

"14. IN such agreement the plaintiffs were
 "described as the purchaser of Flat Unit
 "Penthouse 1 in Hobson Court the purchase
 "price being \$61,275."

(3) the agreement itself is not the same as ACD; (4) the variation pleaded by the first plaintiff, that in place of shares he would receive a unit title, is omitted by reason of (2).

Agreement B on which the second plaintiff's claim is largely based varies from agreement ACD in the following material ways: (1) its recitals refer to the purchase of a flat unit and not shares and throughout the agreement where shares are mentioned in ACD the flat unit is mentioned in B; (2) there is a new clause 7 in B which reads as follows -

"7. The Society will proceed to arrange for
 "title to the said flat to be issued and
 "transferred to the purchaser such title
 "to be issued, at the sole discretion of the
 "society, either ~~under the provisions of the~~
 "~~Unit Titles Act 1972 or by way of a Company~~
 "~~Share Structure together with an Occupation~~
 "~~Contract for the said flat."~~

(We set it out as it appears including deletions.)

In the case of the fifth plaintiff a different agreement with PSIS is pleaded. It is agreement E and is the same as agreement B of the second plaintiff save for clause 7 which reads -

"The Society will proceed to arrange for
 "title to the said flat to be issued and
 "transferred to the purchaser such title
 "to be issued, at the sole discretion of
 "the Society, either under the provisions
 "of the Unit Titles Act 1972 or by way of
 "a Company Share Structure."

In other respects the statement of claim of the fifth plaintiff, mutatis mutandis, corresponds with that of the second plaintiff.

From that analysis certain features emerge. In the first place there is no express reference in any of the agreements to the unit title being either leasehold or freehold. (For this purpose we include as part of the agreements of the first third and fourth plaintiffs the variation mentioned by Mr Eichelbaum as common to each and having the effect of substituting the sale and purchase of a unit for the sale and purchase of shares.) It follows therefore that the quality of the title to be given by PSIS depends upon the true construction of the documents in a matrix or in matrices of fact which on the evidence will be if not wholly at least substantially identical, or upon the implication of a term in the like setting. Reference may be made to the speech of Lord Wilberforce in Liverpool City Council

Irwin [1977] A.C. 239, 253-4. (Mr Eichelbaum was not able to give, or perhaps was unwilling to commit himself to, a precise statement of the nature of the term sought to be implied.) Secondly the cases as a whole of the first, third and fourth plaintiffs as the pleadings and agreements go will similarly be wholly or at least substantially the same. Thirdly the case of those three plaintiffs - according to what we were told as to the variation of agreement ACD - corresponds as well with either that of the second or the fifth plaintiff depending upon whether the variation of the share agreement of the three matched clause 7 of agreement B or agreement E. Fourthly the distinction between B and E lies in the right of the PSIS in the case of E to opt for a company share arrangement with an occupation contract instead of a unit title. There is no evidence of any such choice having been made by PSIS. Agreement E is averred as having been entered into on 10 December 1976 and to bear now the date 2 April 1979. Agreement B is claimed as having been entered into on 20 April 1977 - four months later - and bearing now the same date. It seems improbable that different tenures would be intended in the one building. If that is right the PSIS would choose unit title to match its obligations under agreement B in which case B and E coincide. Fifthly even if the expressed differences between clause 7 of agreements B and E exists or continues to exist the temporal infinity of freehold or beneficial ownership of shares on the one hand is opposed to a finite tenure not exceeding 99 years on the other. And in that area the issues of construction or implication are more than merely similar.

We are of opinion, on the material before the Court, that there are reasonable grounds to conclude that if separate actions were brought by the several plaintiffs common questions of law and fact would arise and that, as we indicated at the outset, is as far as the issue need be taken at this stage.

We desire to make it clear that nothing we have said is intended to abridge the right of PSIS once the action is commenced, or at such later stage before trial as it may be advised, to apply to strike out or stay the action upon the ground that, as the case then stands, the joinder was not justified by the provisions of R.59. And upon proper particulars having been given by the plaintiffs (and if necessary discovery had) and other pleadings completed PSIS may be able to show that such commonalty of questions as then appear to exist are too insignificant to support a continued joinder in whole or in part or that for other reasons the joinder embarrasses it or will delay the trial.

We have added those reservations out of caution. They are not intended to encourage procedural objections in this case. On any view the claims of the intended plaintiffs have so much in common that, even if not combined in one action, it would probably be found convenient for the same Judge to hear all five. Even if he had to hear them as separate actions one after the other, he would be likely to reserve judgments until all had been heard and to consider them together, taking into account whatever differences had emerged. The interlocutory procedures would likewise take place contemporaneously. In the event, therefore, we doubt whether there would be any significant advantage from the

point of view of the efficient administration of justice
in insisting on separate actions.

The appeal is dismissed. There will be no
order as to costs.

James J.

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Appellant

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