

COURT OF APPEAL.

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11th July, 1997.

Before: Sir David Calcutt, Q.C., President;  
R.D. Harman, Esq., Q.C.; and  
R.C. Southwell, Esq., Q.C.

Between:	Arya Holdings Limited	Plaintiff
And:	Minorities Finance Limited	Defendant

Appeal by the Plaintiff from the Judgment of the Royal Court (Samedi Division) of 10th July, 1995, whereby it was held that a claim based on the principle of d'Allain-v-de Gruchy, (1890) Ex 196, is a cause of action founded on tort and as such is prescribed.

Advocate R. J. Michel for the plaintiff  
Advocate A. Dessain for the defendant

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JUDGMENT

SOUTHWELL JA: By its judgment of 28th April 1994, reported at (1994) JLR 149 ("the First Appeal"), the Court of Appeal ordered that all the causes of action then relied on by the plaintiff, Arya Holdings Limited ("Arya") be struck out, with the only potential exception of a claim based on the decision of the Royal Court in d'Allain -v- de Gruchy (1890) 214 Ex 196, which I will refer to as "a d'Allain claim". The Court of Appeal gave to Arya the opportunity to re-amend its amended Order of Justice so as to plead a d'Allain claim, and, if that were done, indicated that it would be open to the defendant, Minorities Finance Limited ("Minorities") to apply to strike out such a claim on the ground that it is founded on tort and therefore prescribed under Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960 ("the 1960 Law"). In that judgment, which I delivered, the Court of Appeal set out the relevant history at some length and I will not repeat it.

Arya has responded to the Court of Appeal's invitation and has re-amended its Order of Justice with a view to pleading a d'Allain claim, with leave of the Judicial Greffier given on 14th September 1994. On 15th June 1995, the Judicial Greffier ordered that there be determined as preliminary issues before the Royal Court on 26th and 27th June 1995, these two issues:

- (1) whether or not a claim based on the principle of d'Allain -v- de Gruchy is a cause of action founded on tort and as such is

prescribed, as decided in the Judgment of the Court of Appeal dated 28th April 1984 (sic: a mistake for 1994); and

(2) whether such claim is or is not prescribed in any event.

The Judicial Greffier ordered that other matters raised by Minorities' summons dated 16th November 1994 (whether the re-amended Order of Justice should be struck out on the ground that it is scandalous or vexatious or on similar grounds or under the Court's inherent jurisdiction, or because the d'Allain claim has not been properly pleaded) be adjourned to a later occasion.

These preliminary issues were tried by the Deputy Bailiff, who gave judgment as long ago as 10th July 1995, to the effect that a d'Allain claim is a cause of action founded on tort, and is prescribed. His judgment is a long and careful one in which he deals in detail with the nature of a claim in Jersey common law based on the Royal Court's decision in the d'Allain case.

Arya as Appellant gave an undated notice of appeal relying on grounds which are considered later in this judgment. (As previously observed by this Court, all documents filed with the Royal Court or the Court of Appeal should be duly dated).

Minorities served a Respondent's notice dated 21st August 1995, seeking affirmation of the judgment of the Royal Court on grounds additional to those set out in such judgment:

- (1) that a d'Allain claim is an action for "abus de droit" or for malicious presentation or is otherwise founded on tort;
- (2) that there is no principle of Jersey law known as a d'Allain claim;
- (3) that a d'Allain claim has anyway not been properly pleaded.

With regard to these grounds, ground (1) appears to be little more than a restatement of the central issue which the Deputy Bailiff decided, and I will return to this later. Ground (2) is in my judgment both misconceived and in any event already decided against Minorities by the previous judgment of the Court of Appeal. As I there explained, before the Bankruptcy (Désastre) (Jersey) Law, 1990 ("the 1990 Law") came into force a claim on the basis of the Jersey common law principles in the d'Allain case would lie in the circumstances which I there described: see [1994] JLR at p.167 lines 5-23 (see also p.168). Ground (3) was specifically ordered by the Judicial Greffier to be adjourned for later decision, as I have already stated.

I can therefore go straight to the central question raised in this appeal: was the Deputy Bailiff right in concluding that a claim based on the principles of the d'Allain case is a cause of action founded on tort for the purposes of Article 2 of the 1960 Law.

Advocate Michel for Arya in his written submissions argued that (apart from tort, which he excluded as a possible candidate) there are five possible ways of analysing the basis of a d'Allain claim:

- (1) as a right of action *sui generis* (see [1994] JLR at p.168 lines 20 et seq);
- 5 (2) as an exercise of the Royal Court's inherent jurisdiction to regulate its own procedure;
- (3) as the imposition of a fine for wrongful conduct as for a contempt of court;
- 10 (4) as a right to equitable damages;
- (5) as the enforcement of an implied undertaking to the Court to be liable for any damage inflicted by an improper *déclaration en désastre*.

15 In his oral argument Mr. Michel rightly did not pursue the third, fourth or fifth ways and confined his arguments to the first and second.

20 The Jersey law of torts derives primarily from the Jersey common law which has its origins in the Norman law of the *Ancienne Coutume*. In relation to the tort of negligence Jersey follows the law of England ((TA Picot (CI) Ltd et al -v- Crills [1995] JLR 33 CA) except as regards any point on which a different rule has been established in Jersey. In  
25 relation to other torts or other aspects of the law of tort, though careful attention is paid to decisions on English common law, the Courts of Jersey have to found themselves on the common law of Jersey. Thus there may be causes of action in tort which are available in England but not in Jersey, and vice versa. A d'Allain claim is a cause of action available in Jersey in accordance with Jersey common law, as a feature  
30 of the Jersey law relating to *déclarations en désastre*, but naturally not also available in England. Accordingly reference to the English law of torts is of limited assistance in seeking to answer the question whether a d'Allain claim is a claim founded on tort under Jersey law.

35 We were referred to the definition of tortious liability in English law formulated by Sir Percy Winfield in The Province of the Law of Tort (1931) at p.32: see also Clerk & Lindsell on Torts, (17th Ed'n) para 1-01:

40 *"Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally, and its breach is redressible by an action for unliquidated damages".*

45 This definition was cited with some measure of approval as applying to torts in Jersey law by Sir Frank Ereaut, Bailiff, in Watson -v- Priddy [1977] JJ 145, at pp.152-153 and pp.153-154. This definition is, however, even as applied to English law, not without difficulties. There are duties "fixed by the law" which give rise to liability outside  
50 the law of torts, the meaning of the adverb "primarily" is wholly unclear, and there are tortious duties owed to particular persons and not to "persons generally". But this definition is of some use in deciding whether a right of action under Jersey law gives rise to tortious liability rather than some other form of liability.

55 The origins of the *désastre* procedure appear in a number of sources to which we were referred, including:

- (1) The Jersey Law of Property, Matthews & Nicolle, 1991, paras. 7.52-7.72, and 7.80-7.84.
- 5 (2) The Report and Proposition on the Bankruptcy (Désastre) (Jersey) Law lodged au Greffe on 18th July, 1989.
- (3) Re Désastre Overseas Insurance Brokers Ltd (1966) 256 Ex.20; JJ 547 per Sir Robert Le Masurier, Bailiff.
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It appears that the procedure began to be developed by the Royal Court from the end of the 18th century, and owed nothing to earlier Norman or Jersey common law antecedents. It was therefore a development of the Jersey common law by the Judges of the Royal Court, proceeding, as is usual in Jersey, case by case. So in Re Désastre Overseas Insurance Brokers Ltd (above) at p.549 the Bailiff stated:

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*"It would appear that the désastre is a creation of the common law of this Island and that the word as originally used was not a term of art but in this context meant a "désastre financier" or financial crash and it was only as the law developed that it became associated with insolvency as a legal concept".*

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The Bailiff went on, at p.552, to define the scope of a désastre as follows:

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*"A désastre is a declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of his moveable estate and to vest that possession in Her Majesty's Viscount whose duty is to get in and liquidate that estate for the benefit of the creditors who prove their claims".*

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The désastre procedure was recognised as a form of bankruptcy or insolvency under the English Bankruptcy Act 1914, section 122, in Re a Debtor, ex parte Viscount of the Royal Court of Jersey [1980] 3 All ER 665, Goulding J.

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The remedies, in the event that the désastre procedure was misused by the plaintiff, were described in the First Appeal at [1994] JLR pp.166-167. The right of action for damages (described at p.167) is one which was brought into existence by the Royal Court in d'Allain -v- de Gruchy in 1890. The only other case cited to this Court in which such right of action for damages was recognised before the First Appeal, was that of Re Royco Investment Co Ltd (1st June, 1989) Jersey Unreported, in which the existence of the right was merely mentioned.

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The decision in d'Allain -v- de Gruchy did not contain any clear statement of principle. That was normal, given the form of decisions of the Royal Court in 1890 and for many years afterwards.

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I refer first to the form of proceeding by which the claim in d'Allain was commenced, which was by remontrance. It was argued by Advocate Dessain for Minories that this meant that the claim was one for "tort personnel" because remontrance was the form of proceeding available only for "torts personnels" (whereas the form of proceeding for "torts matériels" was an Ordre de Justice). He relied in this respect on Le Gros, Traité du Droit Coutumier de l'Île de Jersey (1943)

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at pp.145-150. In my judgment this argument is based on a misreading of this passage in Le Gros. It is true that Le Gros, in dealing with "torts", indicated that "torts personnels" had to be sued on by remontrance, and "torts matériels" by *Ordre de Justice*. That remained  
5 the position until the Royal Court (General) (Jersey) Rules 1963 came into force, when by Rule 9 an action founded on a "tort personnel" was required to be instituted by an *Ordre de Justice* in the same manner as an action founded on a "tort matériel", and no longer by means of a "remontrance".

10 But, contrary to Mr. Dessain's argument, it does not appear that only *torts personnels* could be sued on by remontrance. Le Gros at p.148 indicated that remontrance was the appropriate means for bringing actions based on other personal grounds of claim, including claims by  
15 married women against their husbands (before 1925), claims by persons under protection against their curators, claims by persons against their general attorneys, and claims in respect of contested elections. The essence of the remontrance procedure (as opposed to the procedure by *Ordre de Justice*) was that:

- 20 (1) it was available only in the case of personal claims, as opposed to claims primarily involved with property;
- 25 (2) the Court was able to give relief as appropriate and (where appropriate) different to the specific relief claimed (whereas in the case of proceedings started by *Ordre de Justice* the Court was confined to the relief there claimed).

30 In my judgment Mr. Dessain's argument based on the use of the remontrance procedure in d'Allain -v- de Gruchy is not well founded, because the use of remontrance was appropriate for personal claims of different kinds, and was not confined to claims based on *torts personnels*. In d'Allain -v- de Gruchy the injury alleged to have been  
35 suffered by Mr. Charles d'Allain seems to have been principally injury to his health (he was 82 years old at the time) and his reputation, and therefore a remontrance based on a personal claim was appropriate.

40 Advocate Michel for Arya argued as his main case that the grant of damages where the *désastre* procedure was misused, as in d'Allain, was made in the exercise of the Royal Court's inherent jurisdiction to protect persons subjected to the *désastre* procedure against such misuse. He accepted that no express undertaking in damages has in the past been  
45 required to be given by the person seeking a *déclaration en désastre*, and that no such undertaking was to be implied. Nevertheless, he argued, the person seeking the declaration owed a duty to the Court (rather than to the person who <sup>itself</sup> sought to be placed *en désastre*) not to misuse the procedure. The Court, in the exercise of its inherent power to control the use of its procedures, and in the event of misuse, could  
50 require the person who made or obtained the *déclaration en désastre* to recompense the person declared *en désastre* in damages. This would not involve, he argued, the exercise by the person declared *en désastre* of any right or cause of action for damages, whether in tort or otherwise.

55 Mr. Michel derived some support for this approach from the recent case of Hughes -v- Clewley (25th January, 1996, Jersey Unreported, per the Bailiff and 14th January, 1997, Jersey Unreported CofA). That case concerned the grant of interim injunctions and their discharge, and a

request for damages arising from the grant. There was no express cross-undertaking in damages, and the Royal Court held that no such undertaking could be implied. The Bailiff continued (p.5, line 26):

5           *"That is not, however, the end of the matter because we should  
be very reluctant to hold that we had no power to order a  
person who had wrongly invoked the process of this Court to pay  
damages for loss which resulted. Even before the enactment of  
10       the Bankruptcy (Désastre) (Jersey) Law, 1990 it was the case  
that the Court had asserted jurisdiction to order a creditor  
wrongfully declaring the goods of a debtor en désastre to pay  
damages for that wrongful act (see de Gruchy -v- d'Allain  
(1890) 214 Ex. 108).*

15           *We see no reason why that principle should not apply to any  
wrongful invocation of the Court's process, particularly where  
the interlocutory relief is obtained ex parte. In our judgment  
we have a discretion, irrespective of whether or not an  
undertaking or cross-undertaking in damages has been given, to  
20       consider whether there has been a wrongful act which ought to  
be visited with damages".*

25           It is apparent from that passage that the Bailiff took the view  
that the d'Allain case involved an exercise of the Court's inherent  
power or "discretion", rather than a cause or right of action in tort.

30           The Court of Appeal in Hughes -v- Clewley (1) kept open the  
question whether an undertaking in damages could be implied (p.7, lines  
26-30); (2) appeared to support the Royal Court's view that if there had  
been a wrongful invocation of the Court's process (both Courts held that  
there had not in that case), then the Court had an inherent power to  
order an enquiry as to damages (p.5, lines 42 et seq, and p.6, lines 52-  
55); but (3) did not refer to the d'Allain case.

35           It is not necessary in the present case to consider whether cross-  
undertakings in damages can be implied where the process of the Court is  
invoked on an interlocutory basis or ex parte. There are obvious  
difficulties in the way of any such implication, and it is right to  
leave this question for later decision (as did the Court of Appeal in  
40       Hughes -v- Clewley). In the present case reliance is not placed on any  
such implication.

45           For present purposes we are concerned only with what I have called  
a d'Allain claim. In my judgment such a claim at common law does not  
involve any exercise by the Royal Court of an inherent jurisdiction  
involving a discretion whether or not to order an enquiry as to damages,  
or whether or not to order the payment of damages. In the d'Allain case  
what Mr. Charles d'Allain, the 82 year old, was enforcing was a right of  
50       action as to which, if established, the Court had no discretion whether  
to enforce it or not. Despite Mr. Michel's able submissions I am not  
persuaded that any exercise of the Court's inherent powers was or would  
be involved in relation to a d'Allain claim.

55           That leaves only two other alternatives, a right of action sui  
generis not founded on tort, or a right of action founded on tort.

Advocate Dessain argued strongly that a d'Allain claim is simply a claim in tort for *abus de droit*. But in my judgment Mr. Michel was right in distinguishing between the two. In the d'Allain case the *déclaration en désastre* was recalled on the ground that Mr. Charles d'Allain as the guarantor owed no debt to the plaintiff, de Gruchy, since the plaintiff had not yet taken steps to enforce his claim against the principal debtor, Mr. d'Allain's son. Mr. d'Allain may or may not have been insolvent: that did not matter, because the plaintiff had at the time of the declaration no cause of action against Mr. d'Allain, and therefore no basis for making the *déclaration* against him.

A stronger way in which Mr. Dessain put Minories' case was based on the analogy with claims for abuse of process or for malicious prosecution of civil claims. He referred us to passages in Clerk & Lindsell on Torts, (17th Ed'n) relating to these torts in English law. He did not refer us to the passage at para. 15-42 of Clerk & Lindsell dealing with malicious presentations of petitions for bankruptcy or liquidation, which in my view represent an even closer analogy. As Mr. Dessain pointed out, with reference to the Winfield definition of tortious liability (while recognising all its limitations):

- (1) the duty recognised in the d'Allain case and in the First Appeal is a duty "fixed by the law", i.e. by Jersey common law;
- (2) the duty is owed to all persons made the subject of *déclarations en désastre* by all persons applying for such *déclarations*;
- (3) breach of such duty is "redressible by an action for unliquidated damages".

The duty is also one owed to the Court, and it is not difficult to conceive of circumstances in which breach of this duty might amount to a contempt of court. But that does not exclude the existence of a duty owed, under Jersey common law, by a person in the position of Minories to a person in the position of Arya, which in my judgment gives a potential right of action as between such persons. This right of action is *sui generis*, in the sense that it is separate and distinct from other causes of action in Jersey law for e.g. *abus de droit* or malicious prosecution of civil claims. But that, by itself, would not prevent it being a right of action founded on tort.

Before reaching a final conclusion on the preliminary issues, I must first turn to the 1990 Law to see what guidance can be derived from it. Under Article 6(3) of the 1990 Law the States have created a statutory right of action available in circumstances more limited in at least one respect than those giving rise to a d'Allain claim at common law. Under the statutory right of action the plaintiff has to prove that he was not insolvent at the time of the *déclaration en désastre*, "insolvency" being defined in Article 1(1) as meaning "the inability of a debtor to pay his debts as they fall due". Mr. Charles d'Allain may have been insolvent according to that test.

Mr. Dessain argued that the statutory right of action is additional to the common law right, and that that remains available today. Mr. Michel argued to the contrary. Both derived some support from my judgment on the First Appeal. Article 6 contains no express provision for the replacement of the common law right of action. In my judgment,

despite Mr. Michel's arguments, no such provision can be implied. Both the common law and the statutory rights of action are potentially available to a debtor wrongly placed *en désastre*.

5 It is, as Mr. Michel pointed out, noteworthy that, on that footing, and assuming that a d'Allain claim is founded on tort, the statutory claim is subject to a twelve month prescription period (under Article 6(4) of the 1990 Law) whereas the d'Allain claim at common law is, if 10 Mr. Dessain is right, subject to a three year prescription period (Article 2 of the 1960 Law). This potential anomaly was amongst the reasons why the Court of Appeal declined to resolve the present issues on the First Appeal without the benefit of fully considered arguments. In the end I have reached the conclusion that this anomaly does exist, and may have arisen because the draftsmen of the 1990 Law did not fully 15 appreciate what is the nature of a d'Allain claim at common law. This is not surprising, since it has taken two hearings before the Court of Appeal to arrive at a reasonably clear assessment of what a d'Allain claim is.

20 In my judgment, therefore:

- (1) a claim based on the principle of the d'Allain case is a cause of action founded on tort;
- 25 (2) it is subject to a prescription period of three years pursuant to Article 2 of the 1960 Law;
- (3) it was, at the date when the *Ordre de Justice* was served on 30 Minorities, already prescribed;
- (4) this appeal should be dismissed.

35 Finally, I wish to express my thanks to Mr. Michel and to Mr. Dessain for their most helpful submissions (delivered in the case of Mr. Dessain while suffering from back pain).

### Authorities

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- Winfield: The Province of the Law of Tort (1930) p.32.
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ER 665.