Those were not special circumstances taking the case outside the principles established in *In re Bayoil SA* ([1998] TLR 606; [1999] 1 WLR 147). Furthermore, failure to litigate the cross-demand prior to the arising of a petition debt was not by itself a bar to the dismissal of the statutory demand.

Mr Justice Rimer so held in the Chancery Division, allowing the appeal of the debtor against an order for costs made against him by District Judge Taylor in Bedford County Court on August 6, 1999.

The district judge refused to exercise his discretion under rule 6.5 of the 1986 Rules to set aside the statutory demand and held that the debtor's cross-demand could not succeed since the claimant, Mrs Pamela J. Johnston, had served the statutory demand in her personal capacity and the debtor's cross-demand was made against her in her capacity as executrix of her late husband's estate.

Mr Deshpal Singh Panesar for Mrs Johnston; the debtor in person.

MR JUSTICE RIMER said that there was nothing in Part 20 of the Civil Procedure Rules which indicated that a claimant suing personally could not be made the object of a counterclaim against her in some different capacity. That was especially so since there was no such rigidity under the old regime.

In considering whether the statutory demand should have been set aside, the principles in *Bayoil* applied. The question was whether the debtor could be considered to have been unable to litigate his claim.

His Lordship said that it was not clear from *Bayoil* whether delay arising prior to the arising of the petition debt should by itself be a bar to the dismissal of the petition. In this case, the debtor's delay in failing to litigate his case prior to the service of the statutory demand was not by itself fatal to the success of the cross-demand.

His Lordship added that service on Mrs Johnston in her capacity as executrix was not a special circumstance taking the case outside the *Bayoil* principles since she was the major beneficiary under the estate.

The estate had been fully wound up and she had not raised by way of defence a plea that no assets remained out of which the debtor's claim could be satisfied. There was therefore a presumption of assets to meet the debtor's claim.

As a result of those special circumstances, although the cross-demand was in form brought against Mrs Johnston in her capacity as executrix it could and should for all practical purposes be regarded as one brought against her personally.

Solicitors: Scott Fowler, Northampton.

Practice — Supreme Court Practice 1999 — notes for assistance are procedural not substantive

COURT OF APPEAL

Published February 14, 2000

Dearman v Simpletest Ltd

Before Lord Justice Henry and Lord Justice Potter

Judgment December 3, 1999

It was not a compulsory requirement in every action for recovery of land that the person in whom the legal estate was vested, rather than the person entitled in equity, be joined as plaintiff to the action.

Note 17B-83 in volume 2 of *The Supreme Court Practice 1999* at pp 1490-1491 was good practice and guidance rather than black-letter law, and was procedural rather than substantive.

The Court of Appeal so held dismissing an appeal by the first and second defendants, Simpletest Ltd and Alex Tidmarsh, from an order of Judge Krikler at Willesden County Court on February 3, 1999 from an order for costs made on the conclusion of an action by the plaintiff David Dearman for possession of Grove End, Grove Hill, Harrow on the Hill, Middlesex.

Section 17, entitled Miscellaneous Parties and Proceedings, of Volume 2 of *The Supreme Court Practice 1999* states in paragraph 17B-83:

"Recovery of land — . . . All the claimants in whom the title to possession is alleged to be should join as plaintiffs. . .

"Except in the case of actions against lessees . . . the proper plaintiff is the person in whom the legal estate is vested, not the person entitled in equity. . ."

Ms Marilyn Kennedy-McGregor for the defendants; Mr Michael Lyndon-Stanford, QC and Mr Robert Deacon for the plaintiff.

LORD JUSTICE HENRY, giving the judgment of the court, said the defendants had no right to Grove End and asserted no property in it.

They simply contended that, at the time the possession order was granted, the proceedings were not properly constituted, relying on the terms of paragraph 17B-83. His Lordship said the note in paragraph 17B-83 first appeared in *The Supreme Court Practice 1926* with no authority given, save for a reference to section 80 of the Common Law Procedure Act 1852, which did not so require.

Indeed, section 80 of that Act was not the section quoted in *The Supreme Court Practice*, to increase the mystery.

The introductory note to section 17B, entitled Parties Generally (at p 1474) indicated that the notes which followed were intended to give assistance and guidance on the questions how to join particular persons as parties to proceedings and which parties to join in particular proceedings. The practice relied on by Ms Kennedy-McGregor was clearly good practice and guidance rather than black-letter law. It was certainly not a compulsory requirement in every case.

It was procedural rather than substantive, in accordance with the modern trend in authority: see the treatment of roughly analogous provisions in *Three Rivers District Council v Bank of England* ([1996] TLR 625; [1996] QB 292, 307h-309h), *Dutton v Manchester Airport plc* ([1999] 2 All ER 675, 688g-j, 690b-h) and *Murman v Nagasena* ([1999] 4 All ER 178, 182j-183f).

Solicitors: Cartier & Co; Deverney Brooke Taylor.