

ROYAL COURT
(Samedi Division) 138.

. 26th July, 1996

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
sitting alone.

Between:	The American Endeavour Fund Ltd	Plaintiff
And:	Arthur I. Trueger	First Defendant
And:	Berkeley International Capital Corporation (A California Corporation)	Second Defendant
And:	London Pacific Group Ltd (formerly known as Govett & Co Ltd)	Third Defendant
And:	London Pacific International Ltd (formerly known as Berkeley Govett International Ltd)	Fourth Defendant
And:	James Hardie Industries Ltd	First Third Party
And:	Firmandale Investments Ltd	Second Third Party
And:	Robert A. Christensen	Third Third Party
And:	Alison Mary Holland (by original action)	Fourth Third Party

AND

Between:	Berkeley International Capital Corporation (A California Corporation)	First Plaintiff
And:	London Pacific Group Ltd (formerly known as Govett & Co Ltd)	Second Plaintiff
And:	London Pacific International Ltd (formerly known as Berkeley Govett International Ltd)	Third Plaintiff
And:	The American Endeavour Fund Ltd	First Defendant

And:	James Hardie Industries Ltd	Second Defendant
And:	James Hardie Finance Ltd	Third Defendant
And:	Firmandale Investments Ltd	Fourth Defendant
And:	Michael G. Allardice	Fifth Defendant
And:	Robert A. Christensen	Sixth Defendant
And:	Graeme A. Elliott	Seventh Defendant
And:	Alison Mary Holland	Eighth Defendant
And:	Volaw Trust & Corporate Services Ltd	Ninth Defendant

(by way of counterclaim)

Applications by the Defendants in the Original Action and by the Plaintiffs in the Counterclaim for orders:

- (1) extending - until three months after the Royal Court hearing of the application of the Defendants in the Original Action to strike out the Plaintiff's Reply to their Answer - the time limits within which the Applicants are to file their Replies to the Answers (a) of the Third Parties in the Original Action; and (b) of the Defendants to the Counterclaim; and
- (2) directing the Plaintiff and the Third Parties in the Original Action and the Defendants in the Counterclaim to pay the costs of and incidental to the present summons on a full indemnity basis.

Advocate M. St. J. O'Connell for the Plaintiff and the Second, Third and Fourth Third Parties in the Original Action; and for the First, Fourth, Fifth, Sixth, Seventh and Eighth Defendants in the Counterclaim.

Advocate J.G. White for the First, Second, Third and Fourth Defendants in the Original Action; and for the First, Second and Third Plaintiffs in the Counterclaim.

Advocate J.C. Gollop for the First Third Party in the Original Action; and for the Second and Third Defendants in the Counterclaim.

Advocate A.D. Hoy for the Ninth Defendant in the
Counterclaim.

JUDGMENT

THE LIEUTENANT BAILIFF: This is an application by the Defendants in the original action (the Defendants) to extend the time within which they must enter a pleading.

5 The present proceedings in Jersey began with an Order of Justice on 24th October, 1995. An answer and counterclaim was filed on 6th February, 1996, the last Defendant to the counterclaim being served on 21st March, 1996.

10 Replies to this were filed in June, 1996, being a reply (to the original answer) and an answer to the counterclaim. The reply was adopted by all the other parties, except Volaw.

15 By a summons issued this month, i.e. July, 1996, the Defendants seek to strike out the reply to their answer. They do not seek to strike out the answer to their counterclaim, although it is submitted on their behalf that if they are successful that answer will of necessity have to be amended. A date has been fixed for the hearing of this summons in February, 1997.

20 The Plaintiff in the original action together with the Defendants to the counterclaim and the parties cited, all of whom have now pleaded, are calling upon the Defendants (in the first action) to answer variously the reply (and answer) of the Plaintiff in the first action and the answers of the Defendants to the counterclaim and those of the parties cited. The Defendants in the original action have now issued a summons which reads as follows:

30 "1) Pursuant to the provisions of Rule 1/5(1) of the Royal Court Rules 1992, as amended and the inherent jurisdiction of the Royal Court the time limits within which the First, Second, Third and Fourth Defendants in the Original Action and the First, Second, Third and Fourth Plaintiffs in the Counterclaim are to file their Replies to Third Party Answers of the First, Second, Third and Fourth Third Parties and their Replies to the Answers to the Counterclaim of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defendants should not be extended so as to expire on three calendar months after the hearing before the Royal

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Court application of the First, Second, Third and Fourth Defendants in the Original Action to strike out the Reply of the Plaintiff in the Original Action".

The application is put by Mr. White for the original Defendants - if one may describe them thus - on a series of grounds.

First, the pleadings are very long and very complicated. No further pleading should be put in until the Court decides what case the Defendants should have to meet. He discussed Mr. Bailhache's letter which is cited in full below:

"Messrs. Ogier & Le Masurier,
Pirouet House,
Union Street,
St. Helier.

2nd July, 1996

Dear Sirs,

The American Endeavour Fund Limited v Trueger
File No. 95/217

Thank you for your letter dated 27th June.

The Status of the Order of Justice

As you know, a pleading is a party's written statement of the facts on which he relies for his claim or defence as the case may be. The Rules of Court provide for a party to file more than one pleading. In the instant case, the Fund has filed both an Order of Justice and a Reply. In those circumstances, neither document contains by itself the definitive statement of the Fund's case, but the documents together do set out the Fund's claims and defences.

Accordingly the Fund's case is not limited by the Reply nor is it limited by the Order of Justice; but we accept that in accordance with the usual rules, it is limited by the combined effect of the two pleadings.

Additional Complaints

You suggest that the Reply contains various complaints which are not to be found in the Order of Justice. We confirm that the Fund's position is that its complaints are to be found in the Order of Justice and in the Reply, the two pleadings complementing each other. To the very limited extent that there is inconsistency

between the Order of Justice and the Reply, then the Reply would naturally stand.

5 It is clear to us that your clients have a right to file a Reply to the Defence to Counterclaim. Your clients may well wish to file a Rejoinder. We confirm that although theoretically the filing of a Rejoinder requires leave, we would have no objection to your clients filing a Rejoinder provided that it is filed contemporaneously with the Reply to the Answer to Counterclaim.

10 While the Fund may at some future stage wish to seek leave to amend, it does not intend to make that application at this stage.

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The Dormant Applications

20 Paragraph A.1 of the Reply and Answer to Counterclaim contains a reservation of the Fund's rights to make an application to have parts of the Answer and Counterclaim struck out for the reasons therein set out. At this stage the Fund does not intend to make any such application, and the consequences of not making an application now are, it seems to us with respect, matters for us and not for you.

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We are surprised to be told that you find paragraph A.1 embarrassing. If you wish to advise us as to why you find the pleading embarrassing, we will give further consideration to your complaint.

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Obviously, if there is to be any application by the Fund to have parts of the Answer and Counterclaim struck out, it behoves the Fund at the time of making that application to identify the passages which are the subject of the application.

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Further Pleadings

40 As indicated earlier in this letter, we anticipate that the Defendants may well wish to submit a further pleading. Indeed we have acquiesced in an extension of time which you have requested for that purpose. We assume you are not inviting us to identify the matters to which your clients should plead.

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Yours faithfully,

Bailhache Labesse".

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He went on to refer to R.S.C. (1995 Ed'n): O.18/3/2 - that is the English Rule - to the effect that a new cause of action must not be put forward in a reply and to this end cited Herbert -v-

Vaughan (1972) 3 All ER 122. Here, in his submission, the rule is that the case must be contained within the "fins" of the Order of Justice which, *ipso facto*, cannot be based on allegations yet to be made.

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Examples of apparent inconsistency were given by him. It is not the Court's duty today to decide whether he is correct in his submissions but only whether his submissions are not frivolous, that is that they are arguable, or not wholly without merit, or, to put it another way, are a genuine cause of complaint. His submission is that the Defendants must be clear as to what he has to answer and that the interests of justice must prevail over any damage caused by delay and that this is more so where the issues, as here, are both numerous and difficult.

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In Mr. O'Connell's submission, a seventh month delay before the hearing of the summons to strike out is unjust, but he had to concede that November, 1996, was no good to his firm and in the view of the Court it is unreasonable to rely on that length of delay. He further submitted that the Defendants should apply for further and better particulars and that the Defendants are only seeking a delay; also the delay would throw the proceedings into chaos. The Court has to observe at this point that so would unclarified allegations if any exist. Here he submitted that the parties know the issues, although he agrees that his clients say that the reply prevails over the Order of Justice. He made severe criticisms of the answer and counterclaim, but the Court notes that although his clients reserve the right to seek to strike them out, they have not applied so to do. In the view of the Court, if there is criticism to be made at this stage, an application to the Court is the proper response.

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He accepted as the Court thinks he had to that, if the pleadings stand, then some parties who have adopted the reply, might be defenceless if the Plaintiffs win on the Order of Justice; and that if the reply is struck out all (except Volaw) will have to replead.

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It is, in his submission, a balancing exercise. There is gross prejudice, he submitted, to his clients by way of delay if the application made today is granted as the Defendants will be enabled to delay and will, in terms, control the delay; his fear being that the action might, effectively, never come before the Court. The Court should enforce the efficient conduct of litigation and it should do so in this case by calling upon the Defendants to plead without giving them a delay.

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Mr. Gollop for the James Hardie Companies first adopted all Mr. O'Connell's submissions and accepted that, although they had criticisms of the answer and counterclaim, they had also not sought to strike them out. His complaint was that his clients had been brought into this action and were left in limbo. Mr. Hoy,

for Volaw, was in the same position and added the further submission that if his clients were able to ignore the niceties then so can the Defendants. In his view the issues were clear enough and well enough known to the parties to proceed.

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In the view of the Court there is no question but that the interests of justice require that the balance falls in favour of delaying a further pleading by the Defendants until their summons to strike out has been heard. It will involve a considerable delay, which in any litigation is undesirable, but with regard to this the Court wishes to remark:

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1. the delay is by no means all down to the Defendants who had agreed to be present at dates in November which have been refused by the Plaintiffs' advocates;

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2. in complicated and difficult cases of this nature it is vital that the pleadings should be in the best order possible, the possible complications of it being otherwise being so obvious that there is no need to state them;

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3. it is in the view of the Court not a frivolous application, nor one the sole purpose of which is to delay.

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The Court wishes to add:

a) that the Plaintiffs and the other parties are prepared at this stage to accept that the Defendants' answer is not, in the view of the Court, something to be weighed in the balance of this application;

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b) there may well be difficulty caused by the delay to James Hardie and Volaw, but their cases cannot be heard separately, and indeed depend on the primary case being properly pleaded.

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The order sought by Mr. White will not, however, be granted quite in the terms sought by him, and the Court will substitute the following order.

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1. The Defendants must, whether by affidavit or otherwise, give to the other parties detailed grounds of the reasons for which they make their application to strike out on or before 30th September, 1996.

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2. No fixed delay will be given after the hearing of the application to strike out, as it is, in the view of the Court, impossible to decide what the outcome may be and the requisite time which is necessary to plead may vary according to the circumstances. Instead, therefore, of a fixed delay, this present application will be stood over to be heard by the Judge who decides the application to strike out, to come on immediately following his decision.

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3. There will be liberty to apply to all parties.

Authorities

R.S.C. (1995 Ed'n): 18/1-18/3.

Herbert -v- Vaughan (1972) 3 All ER 122.

Earp -v- Henderson (1876) Ch.D. 254.

Pacific Investments -v- Christensen (27th June, 1995) Jersey
Unreported.

Rahman -v- Chase Bank (1994) JLR 186 CofA.

Royal Court Rules, 1992 (as amended): Rule 1/5.

R.S.C. (1995 Ed'n) Vol. 1: Part 1: pp. 286-9 (O.18).