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ROYAL COURT  
(Samedi Division) 64.

2nd April, 1996

Before: The Judicial Greffier

Between	Roger St. Clare Porteous	Plaintiff
And	Danlerov Holdings Limited	First Defendant
And	Reginald George Oliver	Second Defendant
And	Baltine Photo Video Supplies Limited (formerly Baltine (Import/Export) Limited)	Third Defendant

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Application by the Plaintiff for leave to join an additional Defendant and to file a re-amended Order of Justice containing claims against the additional Defendant.

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Advocate R.J.F. Pirie for the Plaintiff;  
Advocate P.S. Landick for the First Defendant;  
Advocate D.E. Le Cornu for the Second and Third Defendants.

JUDGMENT

THE JUDICIAL GREFFIER: On the afternoons of 26th and 29th February, 1996, I heard argument in relation to these applications and reserved my Judgment. This action relates to the ownership of 250 shares in the Third Defendant. The action was commenced in early January 1991 and the Plaintiff alleged in the Order of Justice and has continued to allege that the relevant shares were transferred to the First Defendant as security for a loan of £4,500. The Plaintiff alleges that the First Defendant wrongfully sold the shares to the Second Defendant and that the Second Defendant was aware that the Plaintiff claimed title to the shares and at the time of the transfer of the shares knew or should have known that he was acting against the wishes and/or contrary to the rights of the Plaintiff. The Plaintiff therefore claims various relief against the First, Second and Third Defendants.

In the re-amended Order of Justice which the Plaintiff is seeking to file he is wishing to allege, for the first time, that as an alternative Mr. David Anthony Overland, the beneficial

owner of the First Defendant, was acting in his own right rather than on behalf of the First Defendant and is, in the alternative, personally liable to the Plaintiff. The Plaintiff is seeking to run the claims against the First Defendant and Mr. Overland in the alternative.

I was addressed on behalf of the Plaintiff and the First Defendant on the question as to whether Advocate Landick could only address me on behalf of the First Defendant or whether he could also address me on behalf of Mr. Overland. I decided that, as Mr. Overland was not yet a party to the action, he was not entitled to be heard in relation to these applications and that, accordingly, Advocate Landick could only address me on behalf of the First Defendant.

Advocate Landick drew my attention to an affidavit sworn by the Plaintiff on 21st August, 1990, in which the Plaintiff deposed, in support of interim injunctions and orders, to the effect that the transaction was a loan made by the First Defendant. The Plaintiff, on the other hand, provided me with a copy of a bank statement of Mr. Overland which indicates that the proceeds of sale of the relevant shares were paid into one of his personal bank accounts.

Advocate Pirie drew my attention to a letter written to him by Messrs. Ogier & Le Masurier, on behalf of the First Defendant, dated 19th February, 1996, which indicated that the First Defendant did not intend to defend the action at the trial which was due to commence on 4th March, 1996, and proposed to allow a Judgment to be taken against it and this upon the basis that Mr. Overland was no longer willing to finance the defence of the action. It is clear to me that it was this letter and the implication that the First Defendant would have insufficient assets to satisfy any Judgment against it which caused the Plaintiff to consider the question as to whether or not he should seek to pursue Mr. Overland personally.

Rule 6/29(b)(ii) of the Royal Court Rules 1992, as amended, reads as follows:-

*"6/29. At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -*

*(b) order any of the following persons to be added as a party, namely -*

*(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between*

*him and that party as well as between the parties to the cause or matter."*

5 The wording of the above-mentioned sub-paragraph is virtually identical to that of Order 15, Rule 6(2) of the Rules of the Supreme Court, (1965, Ed'n) as amended, and, for this reason, both counsel referred me to English authority in relation to the principles to be applied on the question of the joining of an additional Defendant.

10 The following parts of the White Book seem to me to be relevant to the principles to be followed in relation to the adding of additional Defendants:-

- 15 (1) the section beginning with the second paragraph of Section 15/6/1 on page 200 of the 1995 White Book (with case references omitted) reads as follows:-

20 *"This rule stands in relation to parties as O.20 stands in relation to the amendment of pleadings and other documents and as O.2 stands in relation to non-compliance; these are all provisions designed to save rather than to destroy, to cure that which is capable of cure. The rule is of general application, and similar provisions under other rules are to be read with it.*

25 *This rule prevents an action being defeated by the misjoinder or nonjoinder of parties, and it provides for any necessary amendment in respect of the parties to an action being made at any stage of the proceedings."*

- 30 (2) The commencement of Section 15/6/6 on page 204 of the 1995 White Book (with case references omitted) reads as follows:-

35 *"Adding or substituting defendants - Prima facie, the plaintiff is entitled to choose the person against whom to proceed, and to leave out any person against whom he does not desire to proceed. Under this rule, the Court has power on the application of the plaintiff to add or substitute a defendant. Where the order is made on the plaintiff's application, it is made subject to his paying the costs thrown away by the additions or substitution."*

45 Rule 6/29(b)(ii) clearly sets out the test to be applied by the Court in relation to the matter of the addition of an additional Defendant. In this case, the new claim against Mr. Overland is in relation to a question or issue arising out of or relating to or connected with the remedy claimed against the First Defendant and, therefore, the question which arises is one

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as to whether it would be just and convenient to determine the issues between the Plaintiff and Mr. Overland at the same time as the issues between the Plaintiff and the First Defendant.

5           There is one further point which I would cover in passing which is that there is not in this action any question that any claim against Mr. Overland would be prescribed. Accordingly, the Plaintiff would be perfectly within his rights to commence a separate action against Mr. Overland and then to seek to  
10 consolidate the two actions or to have them tried at the same time. I have no doubt that the claims against the First Defendant and against Mr. Overland fall within the terms of Rule 6/11(1)(b) because the rights to relief claimed in relation to the First Defendant and Mr. Overland are in respect of or arise  
15 out of the same transaction or series of transactions.

Both counsel also addressed me on the general principles in relation to the amendment of pleadings and the following sections from the 1995 White Book appeared to me to be particularly  
20 relevant:-

(1) The section commencing at the start of paragraph 20/5-8/6 on page 371 which (with most case references omitted) reads as follows:-  
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*"General principles for grant of leave to amend - It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings".*  
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*"It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights..... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace.... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right".*  
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In *Tildesley v. Harper* (1876) 10 Ch.D. 393, pp.396, 397, Bramwell L.J. said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs".

(2) The section commencing at the start of section 20/5-8/10 on page 374 reads as follows:-

"Before the trial or hearing- Leave is readily granted, on payment of the costs occasioned, unless the opponent will be placed in a worse position than he would have been if the amended pleading had been served in the first instance (*Steward v. North Metropolitan Tramways Co.* (1886) 16 Q.B.D. 556) or some injury caused to him for which he cannot be compensated by payment of costs (see "Costs no remedy," paras. 20/5-8/19). Thus, a plaintiff will be allowed to amend by adding a claim for special damage when proof of special damage is essential to the cause of action (*Weldon v. Neal* (1887) 19 Q.B.D. 394) or to add a new claim which is "so germane to, and so connected with, the original cause of action, that it would be a denial of justice" if leave to add it were refused (*Att.-Gen. v. West Ham Corp.* (1910) 74 J.P. 196, C.A.). A plaintiff may add a new cause of action, the defendant a new defence. The costs are always in the discretion of the Court; in some cases they will be reserved to abide the event, or for the Judge at the trial to award (see *Roe v. Davies* (1876) 2 Ch.D. 735).

There will be difficulty, however, where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, or misrepresentation or other such serious allegation, the Court will ask why this new case was not presented originally; and may require to be satisfied as to the truth and substantiality of the proposed amendment (*Lawrance v. Norreys* (1890) 39 Ch.D. 213; see judgment of *Stirling J.* p.221, and of *Bowen L.J.* p. 235).

So in a libel action, if the defendant seeks at a late stage to amend his defence by adding a plea of justification, his application will be closely inquired

5 into, and it will be allowed where he has shown due diligence in making his inquiries and investigations, but it may well be refused if he has been guilty of delay or has not made proper inquiries earlier (Associated Leisure Ltd. v. Associated Newspapers Ltd. [1970] 2 Q.B. 450; [1970] 2 All E.R. 754, C.A.).

10 Where leave to amend a pleading is granted close to the date of trial, the Court may in its discretion adjourn the date of trial, so as to enable the opposite party to meet the new case raised by the amendment or to allow time for further particulars, discovery of documents and so on, arising out of the amendment (see per Lord Denning M.R. in Associated Leisure Ltd. v. Associated Newspapers Ltd. [1970] 2 Q.B. 450, p.457)."

15 (3) The paragraphs which commence at the start of section 20/5-8/12 read as follows:-

20 "Where the amendment asked for is a substantial one, such that the plaintiff could not succeed without it, he will in a proper case be only allowed to amend at the trial on payment of all costs incurred up to date, and any costs thrown away by reason of the amendment (Jacobs v. Schmalz (1890) 62 L.T. 121, p. 122; King v. Corke (1875) 1 Ch.D. 57; Bowden's Patents Syndicate Ltd. v. Herbert Smith & Co. [1904] 2 Ch. 86). And a plaintiff who accepts an order for amendment on such terms cannot afterwards appeal against it (ibid. [1904] 2 Ch. 122, C.A.). In some cases the Judge will require evidence that the party applying to amend could not with reasonable diligence have discovered the new facts sooner (Moss v. Malings (1886) 33 Ch.D. 604).

35 Where a party obtains leave to amend at the trial which results in the adjournment of the trial, he will generally be ordered to pay, not only the costs of the amendment, but also the costs thrown away by the adjournment (Ascherberg, Hopwood & Crew v. Casa Musicale Sonzogno di Pietro Ostali S.N.C. [1971] 1 W.L.R. 1128; [1971] 3 All E.R. 38, C.A.)."

45 In this particular case the application to amend has been made very late in the day and very close to trial. On the other hand, the Plaintiff says that it was only the fact that the First Defendant indicated that it no longer intended to continue to contest the action and by implication that it would not have sufficient funds to satisfy any Judgment that led the Plaintiff to consider as to whether he had a cause of action against Mr. Overland. This is an action which has had an unfortunate history in relation to the fixing of dates for trial. The very fact that  
50 the application for amendment was made so late in the day made it

impossible for the trial to continue commencing on 4th March, 1996.

5 The First Defendant urged me to find that the Plaintiff was acting *mala fide* in seeking the amendment as referred to in the section from section 20/5-8/6 and that the Plaintiff was not acting in good faith as mentioned in the quotation from 20/5-8/10.

10 Clearly, the Plaintiff will have major obstacles to overcome in order to prove his case, not the least of which will be the manner in which the Order of Justice has been worded for five years and the terms of his affidavit dated 21st August, 1990. Although he now seeks to proceed in the alternative, he will have to give evidence as to who were the parties to the alleged loan. 15 However, Mr. Overland was not before me in relation to the Summons and the prescription period in relation to the claim against him has not expired. There is a danger of my allowing myself to be drawn into considering arguments at this stage which ought only to be heard if a striking out application were to be brought by Mr. Overland. The Plaintiff also says that he only 20 learned of the fact that the proceeds of sale of the relevant shares went directly into Mr. Overland's bank account when discovery occurred.

25 I am satisfied that, in accordance with Rule 6/29(b)(ii), Mr. Overland is a person between whom and the Plaintiff there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the present action which it would be just and convenient to determine as between the Plaintiff and Mr. Overland as well as between the parties to the present action. Although the Plaintiff's case against Mr. Overland has its difficulties, I am not prepared to go so far as to say that it is being brought *mala fide* and is, therefore, not 35 brought in good faith.

Accordingly, I am prepared to grant the Plaintiff's applications but this only upon terms that the Plaintiff pay the costs thrown away by reason of the vacation of the commencement 40 of the trial on 4th March, 1996, in any event. The bringing of this application so late in the day, although motivated partly by the notice given by the First Defendant that it did not intend to continue defending the proceedings, was the direct cause of the loss of these dates.

45 Advocate Landick argued that if the amendment were to be allowed and an adjournment flowed therefrom, his client could not be compensated in costs effectively because the Plaintiff had no way of satisfying any Judgment against him. I disagreed with this submission for two reasons as follows:-  
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5 (1) Firstly, because the First Defendant might well not continue to defend the action even with the leave being granted and if he did not then there would be some kind of fund available from monies obtained from the First Defendant.

10 (2) Secondly, because in determining the issue as to whether or not a party can be compensated in costs the decision should, in my view, not be based upon the question as to whether or not any Order made for costs is likely to actually be satisfied. To find otherwise would be to put an impecunious party into a worse position than a party of reasonable means, which would, in my view, be unjust.

15 I also note for the record the position of the Second and Third Defendants in relation to this matter which was that they did not oppose the applications of the Plaintiff provided that they were compensated for costs thrown away by reason of the adjournment of the trial.

20 Finally, I will need to be addressed both upon the timetable for service of the re-amended Order of Justice and for consequential pleadings and in relation to the costs of and incidental to these applications.



Authorities

Royal Court Rules 1992, as amended: Rule 6/29 (b) (ii).

R.S.C. (1965 Ed'n): O.15, r, 6(2).

R.S.C. (1995 Ed'n): 15/6/1,6.  
20/5-8/6.  
20/5-8/10.  
20/5-8/12.

Laurens -v- Jersey Mutual Insurance Society (24th February, 1988)  
Jersey Unreported; (1987-88) JLR N.4.

Mayo Associates & Ors. -v- Anagram (Bermuda) Ltd. & Ors. (23rd  
March, 1995) Jersey Unreported.

Rahman -v- Chase Bank (3rd June, 1994) Jersey Unreported, CofA.

Duquemin & Ors. -v- Reynolds (1987-88) J.L.R. 259.

Laurence -v- Lord Norreys (1888) 39 Ch. D.213 C.A.

King -v- Cork (1875) 1 Ch.D. 57.

Bourke -v- Davies (1889) 44 Ch.D. 110.

Baron Everlo -v- Fitel Ltd. Ors. (1987-88) JLR 687.