7 pages.

ROYAL COURT
(Samedi Division) 172.

23rd August, 1994.

Before: The Judicial Greffier

Between:	Gordon John Hervé	First Plaintiff
And:	Retreat Farm (1988) Limited	Second Plaintiff
And:	David Alfred Cadoret	Third Plaintiff
And:	Edward Paul Egré, Junior	Fourth Plaintiff
And:	H & H Jersey Growers (1972) Limited	Defendant

Application by the Plaintiffs for leave to file an amended Order of Justice.

Advocate B.E. Troy for the Plaintiffs.
Advocate D.E. Le Cornu for the Defendant.

JUDGMENT

JUDICIAL GREFFIER: On 7th August, 1991, the Plaintiffs served an Order of Justice on the Defendant. In the Order of Justice they complained that the Defendant was a company which operated as a grower's co-operative for the marketing of produce, that for many years any profits from a particular year had been distributed to growers proportionately to the quantity of produce marketed by individuals through the Defendant during the relevant financial year, that they had now ceased to market produce through the Defendant, that as a result of this they ceased to qualify to be shareholders and had to sell their shares to a person nominated by the directors of the Defendant at a fair value as certified by the auditor for the time being of the Defendant and that the auditor of the Defendant had valued their shares at a nominal figure which did not take account of sums of money which had been generated by way of profit during years in which they had been marketing produce through the Defendant. In its Answer the Defendant claimed that it had properly created capital reserves to meet any bad debts and that it was not bound to distribute any accumulated profits from particular years to members. The Defendant's Answer was filed on 7th July, 1992. The action was set down on the

hearing list on 20th October, 1992. Dates were fixed for the hearing of the action on 28th to 30th June, 1993, but these were subsequently vacated. Subsequently further dates were fixed for the hearing of the action on 31st January to 2nd February, 1994, but these were vacated by Order of the Greffier dated 9th November, 1993. The Plaintiffs are now seeking to amend the Order of Justice as follows:-

(a) to claim that the shareholding was not in the nature of a financial investment but was by way of qualification to share the profits of the company and that it was part of the overall agreement between the company and shareholders that profits would be distributed;

(b) to claim that the value of their shares should take into account the amounts which had not been distributed;

(c) to claim for a variety of different reasons that accumulated profits ought to have been distributed to them;

(d) to claim for a variety of reasons that the reserves which had been built up were unnecessary or no longer necessary;

(e) to claim for a variety of reasons that the directors had not acted in good faith in failing to distribute accumulated profits; and

(f) to claim that the Defendant was acting from improper motives in not distributing previously accumulated profits.

The general principles in relation to the granting of leave to amend a pleading, in Jersey, follow the principles set out in the R.S.C. Section 20/5-8/6 of the 1993 R.S.C. reads as follows (without some of the case references) -

> *"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".

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"."

In the very well-known Rahman case there was a reserved Judgment delivered by the Court of Appeal on 3rd June, 1994. This Judgment included a long quotation from the case of Ketteman -v- Hansel Properties Limited (1987), AC 189. I am going to quote a section from this quotation which begins on line 38 on page 8 of the Unreported Judgment -

"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of

litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings."

The Ketteman -v- Hansel Properties Limited case related to a very late application to amend a pleading. The Rahman amendment was being sought ten years into the trial of an action and after a number of preliminary points had been determined and in circumstances in which the Second Defendant was seeking to do an about-face in terms of their pleadings.

The second paragraph of section 20/5-8/10 of the R.S.C. reads as follows (without the case references) -

"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 substantially of the proposed amendment."

Although the above quotation is correct I suspect that the word "substantially" should read "substantiality".

Section 20/5-8/20 reads as follows (without the case references)-

"Delay - A slight delay is not a sufficient ground for refusing leave. But if an application which could easily have been made at a much earlier stage of the proceedings be delayed till after evidence given and a point of law argued, leave may be refused."

Section 20/5-8/22 of the 1993 R.S.C. begins as follows (without the case references) -

"Fraud, adding allegation of - Although it has been stated that it is "the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance" yet such an amendment may be allowed at an early stage. There is, indeed, no rule of practice that allegations of fraud have to be pleaded at the outset and could not be added by amendment, and amendments alleging fraud are no different from other amendments which are allowed on the general principle that

all amendments are allowed so that the real matters in controversy between the parties are before the Court, and accordingly the Court in its discretion may allow an amendment to add a plea of justification in a libel action, even though fraud is the gist of that plea".

Advocate Le Cornu, for the Defendant, alleged that the pleading had existed in its original form for three years and that now new issues were being raised which were tantamount to allegations of fraud against the directors of the Defendant and the Defendant itself.

Although the principles set out above clearly indicate that Courts are more reluctant to allow amendments to pleadings in order to allege fraud than in relation to other matters, it does not appear to me that any allegation of fraud is being made in the amended Answer. The strongest allegations against the directors of the Defendant are of a failure to act in good faith in the exercise of their powers, of having pursued improper motives and of having acted arbitrarily and capriciously with the intention of wrongly excluding the Plaintiffs from the distribution of accumulated profits. Although these are close to allegations of fraud they are not actually an allegation of fraud. However, I accept that these are serious allegations against the directors of the Defendant. In accordance with the quotation from the second paragraph of section 20/5-8/10 I asked Advocate Troy why these allegations had not been made at an earlier date. His reply, on behalf of his clients, was that he had not realised the significance of the need to make such allegations until the Jersey case of Baker -v- Falle (6th November, 1991) Jersey Unreported; (1991) JLR 284, which had dealt with capriciousness and improper motive in relation to company matters.

It appears to me that the proposed amendments do not greatly change what is being sought by the Plaintiffs, which is a distribution of profits accumulated in years during which they were growers or a proper valuation of their shares in order to reflect these accumulated profits. Any Court will be bound to ask itself the question as to why the Defendant has continued to retain large reserves which, according to the Plaintiffs' amended Order of Justice, are unnecessary.

On the matter of delay, it appears to me that this is a very different situation to that which existed in the Rahman action.

However, the fundamental question appears to me to be where the balance of justice lies in this case. In the Rahman case the Court discussed five factors, the second of which is relevant to this case and was the length of time for which the pleading had stood in its unamended form. In this particular case it has been three years. However, during those three years there have been some developments in the marketing practice of the Defendant which

could be significant. It does not appear to me that this factor of delay is sufficiently significant in this case to warrant my refusing leave to amend. The fourth factor mentioned in the Rahman case was Public Interest in the efficient conduct of litigation. In this particular case, dates have twice been fixed and twice lost in relation to the trial of the action. It appears to me that this is a case in which the Plaintiffs, upon further consideration of their case, have realised that it can be presented in a more effective and forceful manner and I cannot, in this case, see that the ground of the need for the efficient conduct of litigation should lead me to refuse leave to amend. The fifth factor in the Rahman case which exists here is the consequence of refusal to grant leave to amend. In that case, it prevented the Second Defendant from continuing with their case. In this case refusal to amend would not prevent the Plaintiffs from continuing with their case but would mean that it would not be as forcefully expressed as they might wish and would not be pleaded in all its alternative lines of argument.

At the end of the day I must exercise the discretion which I have according to my assessment of where justice lies. I cannot see that there will be any injustice to the Defendant in my allowing the proposed amendments (with the exception only of the proposed amendment to the interim injunctions which is beyond my powers). The Defendant can adequately be compensated in costs. They will not be put into a worse position than they would have been in had the action been pleaded in the form of the amended Answer from the beginning, save for the question of costs. There is no reason to suspect that the Plaintiffs are not acting in good faith in this case.

Accordingly, I am going to exercise my discretion in this matter in favour of allowing the proposed amendments (with the exception of the extension of the injunction).

I will need to be addressed both upon the matter of the costs of and incidental to the application to amend and in relation to the matter of costs thrown away by reason of the amendment.

Authorities

Rahman -v- Chase Bank & Ors. (3rd June, 1994) Jersey Unreported C.of.A.

Ketteman -v- Hansel Properties (1987) A.C. 189.

R.S.C. (1993 Ed'n): 20/5-8/6, 8/10, 8/20, 8/22.

Baker -v- Falle (6th November, 1991) Jersey Unreported; (1991) JLR 284.

Taylor & 8 Ors. -v- Kitchen & Ors. (1985-86) JLR N.4.

Laurens -v- Jersey Mutual Insurance Society (1987-88) JLR N.5.

Jacob & Goldrein: Pleadings: Principles & Practice (1st Ed'n): Chapter 11: Amendment of Pleadings.