27th October, 1986.

BETWEEN	Francis Taylor, Henry Kitchin, John McCart, Geoffrey Wilson, Andrew Priestly, Jeffrey Taylor, George Bell, Jeffrey Plowman and H. Vernon trading as Stancliffe Todd & Hodgson	PLAINTIFFS
AND	Terence Kitchin and George Hope-Smith trading as Charltons	FIRST-DEFENDANTS
AND	M & M Agencies Limited	SECOND-DEFENDANTS
AND	Michael C. McDonald	THIRD-DEFENDANT

BAILIFF: This is an application by the plaintiffs, Stancliffe Todd & Hodgson, being a firm of stockbrokers, to amend the prayer and in the course of the argument a submission was made to us to amend also two paragraphs in the Order of Justice which was signed on the 29th April, 1986, alleging that the first defendant, Terence Kitchin and George Hope-Smith trading as Charltons, who are chartered accountants, were indebted to the plaintiffs, in respect of a number of transactions, or to be more precise in the difference between purchase and sales which the plaintiffs had carried out on the instructions of the defendants. There were two other persons involved in this case or two other parties, the second defendant, M & M Agencies Limited and Michael McDonald, third defendant, and in respect of those two other parties, judgment was obtained against them. The second defendant was condemned to pay the amount claimed in the Order of Justice which was £12,401.70 on the 23rd May and subsequently as a result of the third defendant failing to file an answer within time, it also was condemned to pay the same amount on the 8th August.

The prayer in the Order of Justice which the plaintiff now seeks to amend is as follows:

"(1) the first defendants to pay to the plaintiffs the said sum of £12,401.70; or (2) alternatively, the second and/or third defendant to pay to the plaintiff the said sum of £12,401.70."

There are other prayers with which we are not concerned.

The plaintiffs this morning now ask that they should amend their Order of Justice by deleting the two paragraphs that I have read and substituting for them the following :

"the first, the second and third defendants jointly and severally to pay to the plaintiffs the sum of £12,401.70."

Now, as has been said by Mr. Renouf for the first defendants, the effect of any such amendment would be to relate back to the time when those amendments were made. He cited his authority for that - the White Book, Order 20/5 8/2 - and therefore he said if we were to grant consent there would be an act of the Court, or in fact two acts of the Court, relating to prayers in an Order of Justice that no longer were in existence or at least had been changed. That he said, would prejudice the second and third defendants - we are unable to see how it could in fact, prejudice the first defendant because there would still be claims against the second and third defendant and of course we understand that the first defendant has applied to the Judicial Greffier to bring in the second and third defendants as third parties, claiming a contribution from them. Now the power of the Court, which it has exercised very often in the past, to amend pleadings is laid down in Rule 6.12(1) which reads: "The Court may at any stage of the proceedings allow a plaintiff to amend his claim, or any party to amend his pleading, on such terms as to costs or otherwise as may be just" and then (2) "any party may at any stage of the proceedings amend his pleadings with the consent of the other parties". We are not concerned with the second part of that rule. The equivalent rule in England is slightly wider or perhaps I should say, slightly more precise, it is Order 28, Rule 1 and it is as follows:

"The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties".

The question I have to apply my mind to first of all is whether I should say that the English rule, precise as it is, can be used with the authorities which have arisen out of that rule, in support of the present application. We have in the past said it can because it seems to us right that the purpose of our own rule is in fact to arrive at the position where the Court and the parties will be able to determine the real questions between the parties and therefore I am prepared to rule that the Court may indeed look at the English

Rule and the authorities to assist us in this particular application. Neither party, in fact, argued that it could not and both parties in fact relied upon English authorities for their individual arguments. That being so, it is not necessary for me, I think, to look at all the authorities. Perhaps the most succinct one is that of the case of G.L. Baker Ltd.-v- Medway Building & Supplies Ltd., reported at [1958] 3 All E.R. at page 540 and I cite and read from page 546 and I read from the top of the page:

"I should next make some reference to the principle to be followed in granting or refusing leave to amend," - and this is from the judgment, I should say, of Jenkins L.J., -"and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned judge with which this court should not in ordinary circumstances interfere unless satsfied that the learned judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties".

I should interpolate here to say of course, from that extract it is clear that this was an appeal.

"Bearing that in mind, I will refer to some of the authorities read in the course of the very full argument on this matter. One begins with R.S.C., Ord. 28, r. 1, which is in these terms:" - and I have already cited them.

"I repeat the second half of the rule 'and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". I do not read the word "shall" there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made "as may be necessary for the purpose of determining the real questions in controversy between the parties". It appears to me that the pleadings as they stood when the matter came before the learned judge were not in this case so framed as to enable the real question in controversy to be determined".

What is the real question, the Court has to ask itself, which has to be determined here. We think there are two real questions: What was the relationship between the plaintiff and the first defendant? and secondly, what were the relationships, if any, between the first defendant and the

second and third defendants? Was there a contract of agency and if there was, were the principles undisclosed principles? There are many matters which would have to be tranché in the course of a hearing but the principal one clearly is, we think that the Court could not give a clear judgment, and here we look at Rule 18(19)5 of the White Book, without determining the issues between the parties, that is to say, the main issue, was there a contract of agency and as I repeat, secondly, what was the contract between the plaintiff and the first defendant? Now if we look at the White Book again, Rule 18(19)5. We really cannot give judgment, the Court cannot give judgment, until it would know what was the position between the parties, indeed, whether there was an agency or not and the Rule also appears to be, in general terms, again which is referred to at Rule 20/5-8/6 and in this case, the rule is in fact set out in more detail in the Baker case which I have cited but in the White Book it is as follows:-

"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"

And then the authors, of course, cite the case of Baker as I have just used and they go on to refer to an extract of the judgment of Bowen L.J. in Cropper -v- Smith (1883) 26 Ch. D. 700 pp. 710-711 which was approved of in 1896 in Shoe Machinery Co. -v- Cultam 1 Ch. 108 p. 112 and I now read from the judgment of Bowen L.J. in Cropper -v- Smith:-

"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" (and there is no suggestion that this mistake or error of the plaintiffs is 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".

And again, the White Book refers to the later case of Tildesley -v- Harper (1876) 10 Ch. D. 393, pp. 396, 397 where 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".

We do not think that any injury has been done to the first defendant by the mistake on the part of the plaintiffs in drafting their Order of Justice in the way that they did and therefore we are going to give leave to amend as requested. However, there is this point left over which has given us some difficulty which is the one raised by Mr. Renouf and I touched on it earlier, what is the effect therefore of this ruling today on the existing judgment?

We think that the proper order to make is not only to allow Mr. White's application, and I should mention incidentally that he has asked us today (and Mr. Renouf whilst disputing the right to have it amended does not criticise the minor details of the moment) Mr. White has asked us to say that at the beginning of paragraph 7 of the Order of Justice, the words should be inserted "in the alternative" and secondly has asked us to strike out in paragraph 10 of the Order of Justice, the words "in the alternative and" following the words "further and" and between the words "further and" and "if" and allowing therefore the prayer to be altered we also allow those amendments to be made as well. But I repeat what Mr. Renouf has said, we then have outstanding two judgments against the second and third defendants which are in terms different from the prayer now permitted in the Order of Justice and we think that is wrong, but because the second and third defendants are not before this Court today we can make no order about them but we can, because the plaintiffs hold the judgments, we can make an order that they are not to be enforced until the second and third defendants have an opportunity of representing to the Court whether they should be amended or struck out depending on what argument they would wish to advance.