ROYAL COURT
(Samedi Division) 157.

22nd November, 1993

Before: F.C. Hamon, Esq., Commissioner
assisted by Jurats Coutanche and Hamon

BETWEEN Basil Fraser Burt and Helen Isobel Burt — PLAINTIFFS

AND The States of Jersey — DEFENDANTS

Application by the Defendant to Amend its Answer

Advocate S.C. Nicolle for the Defendant
Advocate G.R. Boxall for the Plaintiffs

JUDGMENT

THE COMMISSIONER: We have before us a Summons brought at very short notice indeed, one might almost say with no notice at all, by Miss. Nicolle the Crown Advocate, acting for the States of Jersey as Defendants to an action brought by the Plaintiffs, Basil Fraser Burt and his sister, Helen Isobel Burt.

The Summons applies for an Order that the Defendant should be permitted to amend its Answer in the terms of draft pleadings; and we have the amended Order of Justice incorporating the three amendments to it, that is three paragraphs at the end of the Order of Justice.

From analysing the three paragraphs it appears that only one is material. It is material in that it sets out the delays that have been caused in this protracted matter, which dates from a decision taken by the States on the 20th August, 1991, and which was only set down for hearing at the instance of the Crown Advocate. After detailing the delays, the material paragraph of the amended Order of Justice, states:

> *"In the premises the Plaintiffs have been guilty of undue delay and of laches such as to bar them from the relief sought."*

It seems to us that that is an important and far reaching allegation. In fact, we went so far as to say that, if it were

taken as a preliminary point, it could destroy the whole of the plaintiff's case if it were successful. The problem that we face is that the amendment was only sought, and Mr Boxall first had notice of it, yesterday, that is Sunday, at some time during the day, and he comes before us to say that the amendment has taken him completely by surprise. He was aware of the delays, of course, but he was not aware that the delays would be used in such a way in the amended Pleading and he asked for time to consider the amendment and to plead to it. Rule 6/12 the Royal Court Rules, 1992 says, rather bluntly:

> ***"Any party may at any stage of the proceedings amend his pleadings with the consent of the other parties."***

Fortunately we have a very useful judgment, if we may respectfully say so, delivered by Mr Commissioner Le Cras in Laurens -v- Jersey Mutual Insurance Society (24th February, 1988) Jersey Unreported. I shall return to this in a moment.

Order 20 Rule 5 of the R.S.C. (1993 Ed'n) at 8.11 says:

> ***"If an amendment is allowed at the trial an opportunity should be given to Counsel to consider it and adduce evidence and Counsel should, if necessary, apply for an adjournment for that purpose. J. Leavey and Co. -v- Hirst (1944) K.B.24 C.A. Often, however, the change of front has been anticipated and a postponement is not insisted upon (see Riding -v- Hawkins (1889) 14 P.D. 56, and Bourke -v- Davies (1889) 44 Ch.D. 110 p.112. In such cases often happens that nothing is said about amendment and the case continues as though the issues which are being fought had been duly raised on the pleadings. (Smith -v- Roberts (1892) 8 T.L.R. 506 p. 507 and see Shickle -v- Lawrence (1886) 2 T.L.R. 776 p. 777".***

And, then skipping a little of the commentary ti goes on, and I quote:

> ***"But the opponent must always be allowed an opportunity of meeting the new matter if he reasonably asks for it Winchilsea -v- Beckley (1886) 2 T.L.R. 300. It is the duty of any Counsel who applies at the trial for leave to amend his pleading "to formulate and state in writing the exact amendment for which he asks" (per Farwell L.J. in Hyams v Stuart King (1908) 2 K.B. 696 p.724.) The terms of the amendment should also be submitted at the earliest possible time to the other parties and handed to the Judge when the application is made (Practice Direction [1947] WN 185). The Court is reluctant to give leave at a late stage unless there is strong justification for***

doing so: (Loutfi -v- C. Czarnikow, Ltd. (1952) 2 All E.R. 823. Leave to amend given after close of case.

And, then again skipping a little the commentary reads:

> ***"It is not the practice today as it was in the past invariably to allow a defence which is different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the Defendant pay all the costs thrown away. The grant of an amendment by the trial Judge is a matter for his discretion to assess where justice lies having regard to many factors such as the strain of the litigation, particularly on personal litigants, the anxiety is occasioned by facing new issues, the raising of false hopes, the disappointment of legitimate expectations since justice cannot always be measured by money: Ketteman -v- Hansel Properties Ltd. (1987) 2 W.L.R. 312 H.L., leave to amend to add to a plea of limitation during the closing stages of the trial refused). The trial Judge must also weigh in the balance "the pressure on the Courts caused by the great increase in litigation:" (per Lord Griffiths, ibid, sed quaere, since this is an indeterminate factor which neither of the parties can be responsible.I"***

Reverting to Laurens -v- Jersey Mutual Insurance Society, an of course that case was decided to a certain extent on the strai the litigation was going to impose on the parties, Mr Commissioner Le Cras quoted, again from the Rules of the Suprem Court, and from various cases notably this passage on page 2, an I quote:

> ***"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 contoversery between the parties to any proceedings or of correcting any defect or error in any proceedings". (See the remarks of Jenkins LJ., in G.L. Baker Ltd -v- Medway Building and Supplies Ltd [1958] 1WLR 1216 p.1231; (1958) 3 All ER 540, p. 546)".***

There is a line of very helpful cases set out by the Commissioner which led him to the conclusion that he was able to allow the amendment but, a case very much in point is that of Clarapede -v- The Commercial Union where Master of the Rolls, Lord Brett, gave a Judgment which is set out in more detail on page 3 which has this

particular sentence contained in it which we feel is very much in point:

> ***"There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time."***

Now, Miss Nicolle says that she could raise this matter, if she wanted to, at the end of the trial as an additional point. We could hear the evidence now and raise that additonal point as a point of law at the end of the trial, but we think that that would be a complete waste of the Court's time, if we may respectfully say so, because it seems to us that the point that is argued goes to the very root of the Order of Justice made by the Plaintiffs and if, in effect, the Order of Justice can be put aside on the basis of laches and undue delay then there would not be the necessity of hearing evidence at all and we would have wished that point to be argued as a preliminary point of law before the evidence was heard. We would have liked that point to be argued, but we cannot tell Counsel how to conduct their case.

We are not prepared to allow the amendment to stand as it is unless Mr Boxall agrees to that; and what he says is that he is not prepared to allow that to happen, he needs time to consider it and to amend his pleadings and we think in the circumstances that that is a perfectly right and proper course for him to take. We are not convinced that he is attempting to raise this matter in order to incur further delays.

Miss Nicolle then raised what is an interesting, and perhaps, an innovative point; she says that if we are not prepared to allow the amendment to stand, she will merely withdraw her application and continue as if the application had never been made, with the Order of Justice standing as it does. We appreciate that the States of Jersey want this matter to be resolved. We appreciate that there has been a very long, and perhaps - we do not yet know - an inordinate delay before the matter could come to Court, however we are not going to allow the amendment, but we will give Miss Nicolle further time - she may only need minutes - to reconsider the point that she made to us and we would like her, on mature reflection, to give us her decision. Either she withdraws her summons, as she intimated that she might, or we let it stand and allow a reasonable time for Mr. Boxall to prepare an amended reply to it.

AUTHORITIES

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

R.S.C. (1993 Ed'n) O.20/5 - 8-11.

Royal Court Rules 1992: 6/12