

ROYAL COURT
 (Samedi Division) 63
 7th April, 1997

Before: The Judicial Greffier

Between	Philip Brendan Van Neste	First Plaintiff
And	Van Neste Financial Management (C.I.) Limited	Second Plaintiff
And	Roy Saunders	First Defendant
And	International Fiscal Services Limited	Second Defendant

Application of the Plaintiffs for leave to file an amended Order of Justice and for leave to convene additional parties as Defendants to this action.

Advocate C.G.P. Lakeman for the Plaintiffs;
 Advocate M.St.J. O'Connell for the Defendants.

JUDGMENT

THE JUDICIAL GREFFIER: This action was commenced by an Order of Justice dated 8th September, 1993. The action concerns an alleged agreement for the First and/or Second Defendants to transfer one half of the shareholding of a company known as Fiscal Services International Limited (hereinafter referred to as "FSI") to the Plaintiffs. There were also other claims in the original Order of Justice which relate to the allegedly wrongful termination of an agreement for the Second Plaintiff to manage FSI and further claims relating to the removal of certain documents from the offices of the Plaintiffs by the Defendants. In addition to the First and Second Defendants, there were two other Defendants to the original Order of Justice namely Messrs. McFadyen and Scott-Warren.

On 15th September, 1993, the parties to the Order of Justice reached a partial agreement as a result of which interim injunctions were lifted and Messrs. McFadyen and Scott-Warren were discharged from the action. There is now, clearly, a dispute as to the effect of that partial settlement agreement and I refer to this again later.

The Plaintiffs are now seeking to amend the original Order of Justice in a number of ways. They allege that the shareholding of FSI has now been transferred to third parties and they are seeking various orders against various other parties in relation to this. Included in the other parties are Mr. McFadyen as a

trustee or agent of a trust, Mr. McFadyen personally and Mr. Scott-Warren personally.

The Defendants, at the hearing before me on 26th February, 1997, opposed the application for leave to amend the Order of Justice. They did so upon a number of different grounds which were as follows:-

- (1) Firstly, they claimed that the Plaintiffs were seeking to renege upon the partial settlement agreement both by seeking to maintain causes of action which were, in their view, clearly withdrawn in paragraph 1 of the settlement agreement and by seeking to join Messrs. McFadyen and Scott-Warren again as parties to the amended Order of Justice.
- (2) Secondly, the Defendants pointed out that in paragraph 22 of the Order of Justice and in prayer (vi) of the amended Order of Justice there were claims of fraud. The Defendants allege that these have not been properly particularised and also submit that these allegations are being made very late in the day.

Section 20/5-8/23 on page 368 of the 1997 White Book reads as follows:-

"20/5-8/23 Immaterial and useless amendments -
The Court will always look at the materiality of the proposed amendment (*Wood v. Earl of Durham (1888) 21 Q.B.D. 501*). An inconsistent or useless amendment will not be allowed (*Sinclair v. James [1894] 3 Ch. 554, p. 557; Durham v. Robertson [1898] 1 Q.B. 765, p. 774; Bevan v. Barnett (1897) 13 T.L.R. 310; C.H. Pearce and Sons Ltd v. Stonechester Ltd, The Times, November 17, 1983, C.A.*); nor an addition of a claim which the plaintiff had precluded himself from raising (*Morel Brothers v. Westmorland [1903] 1 K.B. 64, p.77; [1904] A.C. 11*). Leave will not be given to amend a defence by adding a plea which was no answer to the action (*Central Queensland Meat, etc, Co. v. Gallop (1892) 8 T.L.R. 225*); nor to add an unnecessary counterclaim (not allowed in *Marshall v. Langley [1889] W.N. 222, and Factories Insurance Co. Ltd v. Anglo-Scottish, etc, (1913) 29 T.L.R. 312, C.A.*); nor to add as defendants persons who are not liable on the contract sued on, nor to make any other amendment raising a case which must fail (*Jones v. Hughes [1905] 1 Ch. 180, p. 187*). A bad plea of foreign law added by amendment at chambers was struck out in the C.A. (*Machado v. Fontés [1897] 2 Q.B. 231*). So if at the trial an amendment turns out to be useless and such as ought never to have been asked for, the party who applied for it will be mulcted in costs (*Litchfield v. Dreyfus [1906] 1 K.B. 584, p.590*)."

5 The Defendants also alleged that the allegations in the amended Order of Justice which were inconsistent with the settlement agreement would be capable of being struck out as an abuse of process and that, accordingly, I should not now allow them in the amended Order of Justice.

10 I considered carefully the issue as to whether, on an application for the amendment of a pleading, it was appropriate for me to consider grounds of objection to the amendment which would be grounds for a strike out application. A Defendant who seeks to oppose parts of a pleading in this way is potentially disadvantaged as compared with a Defendant who consents to the amendment, subject to his retaining rights to seek to strike out, and who then applies to strike out with a supporting affidavit. For one thing, the Defendants here did not have the benefit of an affidavit in support of their claims. However, it seems to me that it is possible for a Defendant to raise, on an application for an amendment, fundamental objections to the proposed amendment and, in my view, if such a proposed amendment would be struck out then leave ought not to be given for it to be included.

25 In this case, a great deal revolves around the construction of paragraph 1 of the terms of the partial settlement agreement dated 15th September, 1993. I am now going to quote that paragraph in full:-

30 *"1. Each and every claim made in the Order of Justice in the above action dated the 8th day of September 1993 or in any way related to the subject matter thereof is hereby withdrawn save the claim made on the part of the Plaintiffs to monetary compensation in respect of his claim to a 50% beneficial interest in Fiscal Services International Limited. The Plaintiffs will not seek to be registered as shareholders pursuant to any rights they may have but the First and Second Defendants will in turn not seek to argue that by failing to be so registered the Plaintiffs are precluded from succeeding in such claim for damages or by reason of any contractual right that they might have had if registered as a shareholder."*

45 The Defendants say simply that as part of the partial settlement agreement the Plaintiffs agreed to withdraw every claim made in the original Order of Justice and every claim in any way related to the subject matter of the original Order of Justice save the claim made on the part of the Plaintiffs to monetary compensation in respect of their claim to a 50% beneficial interest in FSI. The Plaintiffs, on the other hand,

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say that the words at the end of the second sentence of the said paragraph 1 being the words "or by reason of any contractual right that they might have had if registered as a shareholder" mean that the Plaintiffs can still maintain a claim for half the shareholding of FSI to be transferred to them. The Plaintiffs submitted that when the second sentence of the said paragraph 1 refers to them not seeking to be registered as shareholders this did not preclude them from becoming beneficial owners of shares with other parties holding the shares as their nominees.

The first sentence of the said paragraph 1 is extremely clear and unambiguous. It says that the Plaintiffs, after the partial settlement agreement, shall have no claim against the Defendants other than a claim for monetary compensation in respect of the claim for 50% beneficial interest in FSI. The second sentence of paragraph 1 is very clear down to the words "such claim for damages". The claim for damages is clearly a reference back to the monetary compensation. What, however, is the meaning of the words "or by reason of any contractual right that they might have had if registered as a shareholder". In my view, any claim arising from those last words would also be a claim for damages or monetary compensation. The Defendants invited me to find that the drafting of this clause was very cautious and intended to deal with a situation in which there might be some claim by reason of any contractual right that the Plaintiffs might have had if registered as a shareholder which would not be covered by a claim for damages. The Plaintiffs, on the other hand, invite me to find that the words "by reason of any contractual right that they might have had if registered as a shareholder" allow the very clearly limited cause of action which remains after the first sentence of paragraph 1 to be opened up again in order for a claim for the transfer of the beneficial ownership of 50% of the company to be sustained. It is absolutely clear to me that notwithstanding the apparent overlap between the "such claim for damages" and the "or by reason etc" that the second sentence of paragraph 1 is dealing with the situation in which the Plaintiffs do not seek to be registered as shareholders or to claim the beneficial ownership of 50% of the shares. In that situation the First and Second Defendants were merely agreeing that that would not prejudice any claim which the Plaintiffs might have for monetary compensation. It is entirely artificial to argue that the words in the second sentence "registered as shareholders pursuant to the rights they may have" do not include the concept of becoming beneficial owners in some way. If the second sentence means what the Plaintiffs say that it means then the whole sentence ceases to have any rational meaning whatsoever because the failure to be registered as a shareholder whilst retaining a claim to be a beneficial owner cannot possibly prejudice any claim for monetary compensation. On the other hand, if I take the words "for damages or by reason of etc" as being the equivalent to the words "monetary compensation" in the first sentence of the said paragraph 1 and registration of

shareholders to include an entitlement to beneficial ownership of the shares, then both paragraphs 1 and 2 make complete sense.

5 Accordingly, I cannot see that there is any way in which any Court could find that the words at the end of the second sentence vary and contradict the plain words in the first sentence of paragraph 1 in the way suggested by the Plaintiffs. If this were a striking out application upon the basis of an abuse of process, then I would strike out all those parts of the amended Order of Justice which sought to introduce any claim other than one on the 10 part of the Plaintiffs to monetary compensation in respect of their claim to a 50% beneficial interest in FSI.

15 This first decision somewhat simplifies the remaining decisions in relation to this matter. The claims against the other Defendants which result from the subsequent transfer of shares after the 1993 agreement to third parties cannot be sustainable because if there was no right to claim the beneficial ownership of these shares subsequent to the partial settlement agreement then there cannot have been any wrong-doing in relation 20 to subsequent transfers.

25 Accordingly, the only parts of the prayer of the amended Order of Justice which are sustainable are those which relate to damages, interest thereon and costs and all claims relating to the beneficial ownership of shares in FSI and to the dealing with those shares subsequent to the partial settlement agreement must be deleted.

30 The amended Order of Justice also contains claims for damages against new Third to Seventh Defendants. The claims against the Eighth and Ninth Defendants drop away because they really relate to the beneficial ownership of the shares in FSI. The claims against the Third to Seventh Defendants named in the Order of Justice are upon the basis of these parties having been parties 35 to the agreement to transfer 50% of the shareholding of FSI to the Plaintiffs. However, Messrs. McFadyen and Scott-Warren in their personal capacities, are the Fifth and Sixth Defendants.

40 The question, therefore, arises, as to whether these claims are an abuse of process by virtue of the terms of paragraphs 1 and 11 of the partial settlement agreement. It appears to me that the first sentence of paragraph 1 of the settlement agreement is as much for the benefit of Messrs. McFadyen and Scott-Warren as for the benefit of the First and Second 45 Defendants. Furthermore, Messrs. McFadyen and Scott-Warren were expressly discharged from the action by the terms of paragraph 11 thereof. It therefore appears to me to be a clear abuse of process to bring them back into the action at this stage in order to claim damages for breach of the alleged original agreement to 50 transfer 50% of the shares to the Plaintiffs. However, no such objection would appear to me to apply to the new proposed Third

Defendant, IFS (Management) Limited, the new proposed Fourth Defendant, Mr. McFadyen as sole or joint trustee of or agent of the Tallunic Trust, and the Seventh Defendant, Mr. Brian Hamilton Morris, as these were not parties to the partial settlement agreement.

However, what is now left of the amended Order of Justice once the principles set out above are followed, will require a substantial re-draft thereof and it seems to me that the Plaintiffs ought now to produce a second version of the amended Order of Justice with more limited parties and seek to obtain the consent of the Defendants to this being filed. If such consent is not obtained then the matter will have to be referred back to me for adjudication. Accordingly, I am dismissing the applications contained in the Plaintiffs' Summons dated 9th January, 1997, and I will need to be addressed by both parties in relation to the costs of and incidental to that Summons. However, I anticipate that some, but much more limited, amendments to the original Order of Justice will be eventually allowed as set out above.

Authorities

- Rahman -v- Chase Bank & Ors. (1994) JLR 186 CofA.
- re Baltic Partners and Application of Sparbanken Sverige (18th April, 1996) Jersey Unreported CofA.
- Khan -v- Goleccha International [1980] 2 All ER 259 C.A.
- E. Farley & Sons, Ltd. -v- Takilla, Ltd. (25th February, 1992) Jersey Unreported CofA.
- R.S.C. (1997 Ed'n): 0.15, r. 6.
0.18, r. 8, 12.
0.20/5 - 8/23.
- Morel Brothers & Co. -v- Earl of Westmoreland [1903] 1 KB 64.
- Jones -v- Hughes [1905] 1 Ch 180.
- Alberto -v- Skelley (10th November, 1995) Jersey Unreported.
- Jones -v- Bryant (17th January, 1995) Jersey Unreported.
- Vekaplast K.G. -v- T.A. Picot (C.I.) Ltd. (1990) JLR 163.
- Osment -v- Constable of St. Helier [1974] J.J.1.
- Royal Court Rules, 1992, as amended, Rule 6/12.
- Hervé et aus -v- H & H Growers (1972) Ltd. (23rd August, 1994) Jersey Unreported.
- Maynard -v- Public Services Committee (11th December, 1996) Jersey Unreported CofA.
- Hydrocarbons Great Britain Ltd. -v- Cammell Laird Shipbuilders Ltd. and others. 58 BLR 127.
- Pirouet -v- Pirouet [1985-1986] JLR 151.
- Gallichan -v- Gallichan [1954] JJ 57.
- Corby -v- Lewis & Le Main [1982] JJ 157.
- Hyams -v- Russell [1971] JJ 1891.
- Matthews & Sowden: The Jersey Law of Trusts (3rd Ed'n):
Chapter 7: Trusts imposed by law.
Chapter 14: Breach of Trust.

Underhill and Hayton: Law relating to Trusts and Trustees (10th Ed'n, 1995): Chapter 7: Constructive Trusts.