

ROYAL COURT
(Samedi Division)

8th October, 1996. 181.

Before: The Judicial Greffier

Between Victoria Wendy Croxford née Fort Plaintiff
And Peter Wavell Luce and
Malcolm John Le Boutillier
(exercising the profession of
solicitors under the name of
"Le Gallais & Luce") Defendants

Application by the Defendants for
leave to file an amended answer.

Advocate R.J. Michel for the Defendants,
Advocate M.St.J. O'Connell for the Plaintiff.

5 THE JUDICIAL GREFFIER: In March 1985, the Plaintiff was injured when
she was struck by a motor vehicle being driven by a Mr. Kenneth
Andrew Le Claire. The Plaintiff sought legal advice from the
Defendants and proceedings were commenced on her behalf within
10 the prescription period. However, these proceedings were
subsequently adjourned *sine die* and remained so adjourned for a
period in excess of five years as a result of which they were
deemed to be discontinued by virtue of Rule 6/20(2) of the Royal
Court Rules, 1992, as amended, and the Royal Court so decided in
September, 1994. As a result of this the Plaintiff has brought
the present action against the Defendants and alleges both
negligence and/or breach of duty and/or breach of contract.

15 The Defendant filed an Answer to the Order of Justice on 20th
October, 1995, and the action was set down on the hearing list on
30th November, 1995. The Plaintiff did not provide her Affidavit
in relation to discovery until 13th August, 1996 and the
Defendants did not do so until later in August, 1996. The
Defendants are now seeking leave to file an amended Answer.

20

Paragraph 2 of the Order of Justice concludes with the
following sentence:-

"The Plaintiff alleges that the accident was caused by reason of the driver's negligence."

5 In the original Answer the whole of the contents of paragraph 2 of the Order of Justice were admitted. In the draft amended Answer the Defendants, whilst continuing to admit the contents of paragraph 2 of the Order of Justice go on to add various paragraphs in which they allege that *"Notwithstanding the Plaintiff's allegation that the accident was caused by reason of the driver's negligence, it is averred that the accident was caused or contributed to by the negligence of the Plaintiff."* 10 There then follow particulars of alleged contributory negligence on the part of the Plaintiff.

15 The first question which arises is whether the sentence which I have quoted above from paragraph 2 of the Order of Justice should be construed as a statement of fact that the Plaintiff alleges something or a statement of fact that what is alleged is true. Advocate Michel asked me to construe the admission 20 contained in the original Answer as meaning nothing more than that it was admitted that the Plaintiff alleged certain facts. Advocate O'Connell, on the other hand, indicated that the reason for the addition in the sentence from paragraph 2 of the words *"The Plaintiff alleges"* was to emphasise and strengthen the facts 25 which were alleged. The relevance of all this is that Advocate O'Connell was asking me to treat this as a case in which a Defendant was seeking to withdraw an admission which they had previously made whereas Advocate Michel was asking me to treat it simply as an application to amend a pleading. The relevant rule 30 in Jersey is Rule 6/12(1) which reads as follows:-

35 *"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".*

40 This is in extremely similar terms to those in Order 20 Rule 5(1) of the Rules of the Supreme Court and, for this reason, in Jersey the Courts have for a long time treated English authorities as having considerable persuasive value in relation to this Rule.

45 The last paragraph in section 20/5-8/16 of the 1995 White Book reads as follows:-

50 *"Admission made by mistake - An admission made inadvertently may be withdrawn, and the pleading amended accordingly (see Hollis v. Burton [1892] 3 Ch.226, p.236; Clarke v. Yorke (1882) 31 W.R. 62, p.63)."*

The first question which I have to determine is what the sentence quoted above from paragraph 2 of the Order of Justice actually means. If it appeared in relation to any of the vast majority of types of cause of action then there would be no

5 difficulty in finding that the words "the Plaintiff alleges"
neither added nor subtracted anything to the following words.
Indeed, an example of this form can be found in the draft amended
Answer where the words "it is averred" are found in the quotation
10 which I have given above. However, in this type of action, where
there is a right of action for the loss of the opportunity of
pursuing the claim, can the addition of the words "the plaintiff
alleges" be construed as changing the sentence to being an
allegation of an allegation from being an allegation of facts.
15 Is it possible that the Plaintiff might have thought that it was
sufficient to plead that an allegation was being made without it
being necessary for her to prove the truth of that allegation if
it were to be denied? Notwithstanding that possibility, it seems
to me that the plain construction of the sentence from paragraph
2 of the Order of Justice is that the Plaintiff is pleading that
the accident was caused by reason of the driver's negligence.

20 The next question is, what is the effect of the admission?
It is an admission that the accident was caused by the negligence
of the driver but it cannot be construed as an admission that
there was no contributory negligence on the part of the Plaintiff
as no such statement has been made in the Order of Justice.

25 Furthermore, Advocate Michel says firstly, that he understood
the relevant sentence to be making nothing more than a claim that
an allegation was being made and that his client did not intend
to admit more than that an allegation was being made and,
secondly, that as he is effectively acting on behalf of the
insurers of the Defendants, it was not until he had the
30 opportunity to read in detail the whole of the voluminous file,
that he became aware that contributory negligence might be an
issue in relation to the measure of damages to be received by the
Plaintiff if she were successful in her claim for negligence
against the Defendants.

35 It appears to me that the addition of the allegation of
contributory negligence is not the same as the simple withdrawal
of a previous admission. If I am wrong on this, then it seems to
me that there has been a degree of inadvertence in relation to
40 the original admission in two different ways as set out above.
Accordingly, I am going to apply the normal principles in
relation to this amendment which are normally applied in relation
to any application to amend an Answer and not any narrower
principles which may apply to the withdrawal of admissions. I
45 say may apply because I am not clear as to precisely how the
principles set out in section 20/5-8/16 of the White Book quoted
above relate to the general principles set out below.

50 The general principles in relation to the granting of leave
to amend a pleading, in Jersey, follow the principles set out in
the White Book. Section 20/5-8/6 of the 1995 White Book reads as
follows (without some of the case references) -

5 "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".

10 "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".

25 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"."

40 In the very well known Rahman case there was a reserved Judgment delivered by the Court of Appeal on 3rd June, 1994, (1994) JLR 186 CofA. 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 3 on page 192 of the Judgment -

45 "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

5 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.

10 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."

15 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 proceedings 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.

20 The second paragraph of section 20/5-8/10 of the White Book reads as follows (without the case references) -

35 "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."

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

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

50 "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."

In this particular case, although there has been some delay in the seeking of the amendment, it does not seem to me that delay is a significant factor, particularly as the Plaintiff herself was not rapid in completing discovery of documents.

5

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 these five factors was the length of time for which the pleading has stood in its unamended form. In this particular case this is not a particularly long period of time and as I have already found that delay is not a significant factor it does not seem to me that this factor is particularly important. The third factor was that already referred to in the quotation from the Ketteman case namely *"The anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial would determine the issues one way or the other."* The Ketteman case was in relation to an attempt to amend at a very late stage indeed. Similarly, in the Rahman case the amendment amounted to an about face and was ten years into the proceedings and a number of parties had reached a settlement between them, presumably upon the basis that the party who was seeking to make the amendment was out of the proceedings. Advocate O'Connell urged upon me that in the light of the original Answer the Plaintiff had a legitimate expectation that no issues would arise in relation to liability (including contributory negligence) in relation to the original accident. Advocate O'Connell urged upon me that the original accident had taken place many years ago and that it had been the negligence of the Defendants which had caused the delay in the claim of the Plaintiff coming to a successful conclusion. Advocate Michel, on the other hand, said that the Plaintiff must have been aware from the Defendants, who were advising her, of the fact that in negotiations with the insurers of the driver the issue of contributory negligence had been an extremely live issue.

10

15

20

25

30

35

The fourth factor mentioned in the Rahman Judgment was that of the public interest in the efficient conduct of litigation. In this case the amendment proposed will lead to a widening of issues and the fact that these issues were not raised initially will lead to some delay. However, it does not seem to me that the delay will be significant.

40

45

The final factor is the consequence which refusal of leave to amend would entail for the Defendants. In this case the Defendants would be barred from alleging contributory negligence on the part of the Plaintiff and this could have a substantial effect in relation to the final amount of any damages due depending upon the amount of contributory negligence found.

50

It seems to me that in this case as in all cases where amendment is sought that various factors are having to be balanced against one another.

In this case it seems to me that the justice of the case lies, in principle, in favour of my allowing the amendment in principle, because the fifth factor and the general principles set out in the White Book in relation to permitting amendment, where this can be achieved without injustice to the other party, clearly outweigh the second, third and fourth factors set out in Rahman as they apply to this case.

I move on now to the detail of the proposed amendment. In the light of the meaning of the sentence quoted above from paragraph 2 of the Order of Justice it seems to me that if I were to allow the amendment then there would be a contradiction between the admission contained in the first sentence of paragraph 3 of the amended Answer and the denial contained in the fourth to sixth lines of paragraph 5 of the amended Answer and that this contradiction must be corrected.

The remainder of the proposed amendments are unobjectionable with the possible exception only of the new paragraph 12.

Advocate O'Connell objected to this upon the grounds that this paragraph contained submissions rather than pleadings of fact. Advocate Michel submitted that the additional paragraph did no harm and served to greatly clarify the matters in issue between the parties.

Upon a careful consideration of the new paragraph 12, it seems to me that it is actually a part of the pleading which relates to the measure of damages which should flow from the alleged negligence of the Defendants. Although it may contain some submissions, it seems to me that it is actually extremely helpful in clarifying the position of the Defendants and that I should therefore allow it in.

Accordingly, I am allowing the amendment subject to my comment above about inconsistencies, which will need to be resolved either by agreement between the parties or by further argument before me. I will also need to be addressed in relation to consequential amendments and upon the matter of the costs of and incidental to the application to amend.

Authorities

- Royal Court Rules 1992, as amended: Rules 6/12(1); 6/20(2)
- R.S.C. (1995 Ed'n) 020,r.5(1)
- Abdel Rahman -v- Chase Bank (1994) JLR 186.CofA.
- Ketteman -v- Hansel Properties, Ltd (1987) A.C.189; (1988) 1 All ER 38; (1987) 1 FTLR 284; (1987) 1 E.G.L.R. 237; (1987) 85 L.G.R. 409; 36 BLR1.
- Wood -v- Philips (1994) Scots Law Times 142.
- Loutfi -v- C. Czarnikow, Ltd. [1952] 2 All ER 823.
- Stancliffe Todd & Hodgson -v- Charltons (27th October, 1986) Jersey Unreported; (1985-86) JLR N.4.
- Laurens -v- The Jersey Mutual Insurance Society (24th February, 1988) Jersey Unreported; (1987-88) JLR N.4.
- Security Express Ltd. -v- Everett (18th December, 1989) Jersey Unreported; (1989) JLR N.4.
- Linder -v- Hopkinson (14th November, 1990) Jersey Unreported.
- Rhaman -v- Chase Bank (2nd December, 1992) Jersey Unreported.
- West -v- Lazard Brothers & Co. (Jersey) Ltd. (11th May, 1993) Jersey Unreported.
- Rahman -v- Chase Bank (16th August, 1993) Jersey Unreported; (1993) JLR N.6.
- Burt -v- States of Jersey (1993) (22nd November, 1993) Jersey Unreported.
- Hervé -v- H & H Jersey Growers (1972) Ltd. (23rd August, 1994) Jersey Unreported; (1994) JLR N.5.