

JERSEY / JUDGMENT

Dalfsen -v- Caversham

[2010] JRC 113 (15 June 2010)

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judgment

the deputy bailiff: 1. This is an appeal against the decision of the Master on the 29th April to refuse leave to the plaintiff to amend his Order of Justice by including paragraphs 43A to 43H on the draft presented to the Master and re-presented to me. 2. The test on appeal against a decision of the Master has been agreed as being that set out in *Victor Hanby Associates Limited* where Chadwick J. A. said:- "In its judgment, the Royal Court directed itself, correctly in our view, that, on appeal against a decision of the Judicial Greffier, it was entitled to approach the matter *de novo* and to exercise its own discretion unfettered by the previous exercise of discretion by the Greffier, although, of course, the view taken by him should be given due weight." And so that is the test which I have applied. This is of course a procedural matter today which is why the Court is sitting as constituted by me as a single judge. 3. The approach by the plaintiff on the principles for leave to amend is such that he relied upon, in particular, the general principles for grant of leave to amend set out in Order 20, Rule 8 at paragraph 6 of the Rules of the Supreme Court and in particular on these statements:- "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 and controversy between the parties to any proceedings or of correcting any defect or error in any proceedings". 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 in accordance with their rights..." And there is a reference then to *Bowen L. J. in Cropper-v-Smith*

(1883) 26 Ch. D. 700 at 710-711:- "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..." There has been a reference to *Bramwell L. J. in Tildesley-v-Harper*

- (1878) 10 Ch. D. 393 at 396 and 397:- "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." 4. That approach, it should be said, has been qualified at least by the judgment of Lord Griffiths in *Ketteman-v-Hansel Properties Ltd*
- [1987] A. C. 189 where Lord Griffiths said this:- "Mr Ogden submitted that the authorities obliged a judge to allow an amendment no matter how late it was made nor for what reason, provided the other party could be properly compensated by an award of costs. He relied upon the authorities set out in the Supreme Court Practice and, in particular, the decision of Brett M. R. in *Clarapede-v-Commercial Union Association*
- (1883) 32 W. R. 262. The Rule of Conduct of the Court in such cases that "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. This was not a case in which an application had been made to amend during the final speeches; the Court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the Rule of Conduct a hundred years ago, today it is not the practice invariably to allow a defence, which is wholly 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 pays all the costs thrown away. 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. 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 is possible to enumerate them all or wise to attempt to do so. That justice cannot always be measured in terms of money and, in my view, a judge is entitled to weigh in the balance the strain that the litigation imposes upon litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new hopes, the raising of new 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." 5. I refer to the decision of Lord Griffiths in that case in the detail I have because I have always found the summary which he makes of the matters

which should go to the exercise of discretion by a judge of great help and I have applied them in particular in this case although of course not all of the factors which he raises are relevant to this case. 6. The primary objection which has been raised to the application for leave to amend has been on limitation grounds when the parties appeared before the Master and in a sense that is the primary defence of the Master's decision which has been raised in this Court by the defendant. That, however, has been, to some extent, neutralised by the undertaking of the plaintiff that the amendment, if leave were given, would take effect from the date of the amendment, rather than from the date of the original order of Justice. Accordingly, the defendant has framed the objections in a slightly different way by saying that the limitation defence is a factor which should be taken into account by the Court in the exercise of its discretion. 7. I have indeed taken that into account but taken it into account rather in this way. It seems to me that it would be possible for the plaintiff to bring fresh proceedings. If the plaintiff is right that the proceedings are not time barred, then the limitation defence would be filed by the defendant and there would have to be a hearing on the evidence which would enable the Court to establish whether the limitation defence was properly raised or not. There would, inevitably, in my judgement, be some cross over in relation to the evidence which would be produced on that argument and the evidence that would be produced before the Court on the proceedings as they now stand, and in particular I have noted that limitation matters have already been raised, albeit in a slightly different context, in paragraph 32 of the amended answer. But that is only part of the likely cross over which, it seems to me, would arise. 8. The convenience, in my judgement, lies in taking the issues together and, despite the fact that there is likely to be some delay; and I do not regard in any sense as unjustified or frivolous, the objections of the defendant to the delays which are likely to be sustained as a result of this decision. Nonetheless, the convenience lies, in my view, in taking these issues together. I make no comments about the strength or otherwise of the limitation defence other than to note that it is clear that the limitation defence is not one which is incapable of being argued, far from it, on the face of the document shown to me. Without deciding the matter at all because one can only decide it after hearing the evidence, the limitation defence looks to be a significantly possible defence for this defendant. Nonetheless, I do not think today is the right place to determine that and it is a matter for the court of trial when it hears all the evidence. 9. Applying the principles in paragraphs 3-6 above, I give leave to amend and I allow the appeal against the decision of the Master. I am going to make some consequential orders, however, as a result taking into account the strictures which the defendant has raised in relation to the question of delay. The amended Order of Justice should be served within 48 hours. I give then leave to the defendant to file an amended answer within 2 months within the service of the Order of Justice. I give leave to the plaintiff to file an amended reply within 1 month of receipt of the answer. Mutual discovery inspection is to take place, discovery within 1 month of the filing of the reply, and inspection within 1 week of the exchange of affidavits of discovery. I add that discovery and inspection of course is limited to the new features of the amendments which have been filed on both sides, there is no need to repeat the discovery and

inspection that has already been given. 10. There should be an application to fix the trial date within 2 weeks of inspection and there should be a directions hearing listed for 2 months before trial. There is an outstanding order for the exchange of witness statements. That, as I understand it from Mr Cushing, was to be achieved by October 2009. I think what I will do in relation to that order is indicate that it clearly is suspended for the time being but there should be application to the Master to fix a new date by which exchange of evidence should take place, but the parties will probably wish to see the documents before they can sensibly make submissions to the Master on that point. 11. I also set aside the Master's order in relation to costs which is to be found at paragraph 8 of the Act of the Royal Court of the 29th April, 2010, and I order in its place that the costs, both here and before the Master in relation to the application to insert amendments under paragraphs 43A to H, should be costs in the cause. When I say costs in the cause in that sense, they are costs in the cause of those amendments, so that if a limitation argument is raised and successfully won in relation to 43A to 43H then the plaintiff would have to pay the costs of and incidental to these amendments and of the hearings in relation to leave to amend. 12. This is a case management decision and I do not think leave to appeal as requested by the defendant is appropriate. Authorities Victor Hanby Associates Limited and Hanby-v-Oliver

[1990] JLR 337 . Rules of the Supreme Court 1999. Cropper-v-Smith (1883) 26 Ch. D. 700. Bramwell in Tildesley-v-Harper (1878) 10 Ch. D. 393. Kettelman-v-Hansel Properties Ltd

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