

**Judgment 45/2005**

**Magloire trading as First Call Recruitment v.  
Wright et al – Royal Court (Civil action file 846) –  
22 July, 2005**

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**Breach of contract of employment – counterclaim filed by defendants – plaintiff’s application for further particulars – defendants ordered to file further particulars of the repudiatory breach they alleged.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 22nd day of July, 2005 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E.,  
Lieutenant Bailiff; sitting alone.

TINA MAGLOIRE  
T/A First Call Recruitment

Plaintiff

and

FIONA WRIGHT  
LAURA GOGUELIN  
LEAPFROG LIMITED

Defendants

WHEREAS on the 12<sup>th</sup> July 2005 the Lieutenant Bailiff considered and application by Exception by the Plaintiff for further and better particulars and heard thereon Advocates P. Richardson and C.H. Edwards, Counsel for the Plaintiff and Defendants respectively;

The Lieutenant Bailiff this day handed down in the terms attached hereto his judgment regarding the said further and better particulars and reserved the question of costs.

S. M. D. ROSS  
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION.**

**Between:**

**TINA MAGLOIRE T/A First Call Recruitment**

**Plaintiff**

**and**

**FIONA WRIGHT  
LAURA GOGUELIN  
LEAPFROG LIMITED**

**Defendants**

**Judgment**

1. As this case has come before the Court three times on interlocutory matters, and nearly two years have elapsed since the Cause was tabled on 10<sup>th</sup> October, 2003, I propose to summarise the opening paragraph of my Ruling on the Defence preliminary objection to the production of the first two Defendants' contracts of service with the Plaintiff delivered on 31<sup>st</sup> August, 2004.

2. The background is that at all material times the Plaintiff and the Third Defendant carried on business in Guernsey as rival agencies for the recruitment of staff for other companies and businesses, presumably also principally carried on in Guernsey. The essence of the case for the Plaintiff, as pleaded, is that the first two defendants, having been engaged by the Plaintiff in March and April of the previous year, and having received in-house training in the course of their contracts of service with the Plaintiff's firm, so that each acquired a certain amount of skill and knowledge in the recruitment of staff, were then poached by the Third Defendant, Leapfrog Ltd.

3. On the 12<sup>th</sup> December, 2003, the Defendants, without prejudice to their right to file substantive defences in due course, pleaded a number of *Exceptions de Forme* seeking further and better particulars of most of the operative paragraphs of the Cause, which the Plaintiffs purported to supply under cover of Advocate Richardson's letter of 18<sup>th</sup> February, 2004. I say 'purported' because the Defendants' then Advocate, Messrs. Carey Olsen, replied on 11<sup>th</sup> March complaining that the particulars given were inadequate, and intimating that as the Cause as pleaded disclosed no cause of action they would, in the absence of satisfactory amendments, shortly be applying to strike it out under Rule 36.

4. The strike out Application was, accordingly, filed on 28<sup>th</sup> May last year, supported by the Affidavit of Advocate Alison Ozanne. The parties duly filed their respective skeleton arguments in accordance with directions given in the Interlocutory Court on 18<sup>th</sup> June, but when that Application came up for hearing on 31<sup>st</sup> August, a preliminary point was taken *in limine* on behalf of the Defendants regarding the production of the documents to which I referred in paragraph 1 hereof.

5. That objection was resolved in the Plaintiff's favour, and the strike out Application was then heard on the 1<sup>st</sup> and 2<sup>nd</sup> September. At the conclusion of her submissions in support of the Application Advocate Le Cras, who then appeared for the Defendants, said that if the Court was not minded to accede to the Application for the Draconian remedy of an order for a strike out, it would be open to the Court to make an

‘unless’ order for the particulars sought under paragraph 4 of the Application of 25<sup>th</sup> May, 2004.

6. In the event I adopted the latter course and, on 1<sup>st</sup> October of that year, I ordered further and better particulars to be given, as requested, of paragraph 11.1, and of paragraphs (a)(ii), (b)(ii), (c)(ii), and (d)(ii) of Request 6 in the *Exceptions*, which related to paragraph 12 of the Cause, within such period as the Advocates should agree, or, in default of such agreement, as set by the Court. At the outset of his submissions on the current Application, Mr. Richardson (who had previously conceded that some of the paragraphs in the Cause required particularisation) stated that the particulars directed had now been provided.

7. The Defendants filed their substantive Defences on 7<sup>th</sup> January, 2005, and included a Counterclaim by the First and Second Defendants pleading, *inter alia*, that their respective contracts of employment by the Plaintiff contained identical implied terms, which are as follows:

“That the Plaintiff would provide a working environment which was reasonably suitable for the proper performance by each of the First Defendant and the Second Defendant of their duties of employment (“the First Implied Term”).

That the Plaintiff would not, without reasonable and proper cause, conduct herself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between herself and each of the First Defendant and the Second Defendant (“the Second Implied Term”).

8. Repudiatory breaches of these implied terms are then pleaded, which are again identical, save that in the case of the Second Defendant there is an additional averment in the particulars given of the alleged breaches. The particulars common to both these Defendants are:

- (i) Bullying and intimidatory behaviour;
- (ii) Manipulative behaviour;
- (iii) Unpredictable behaviour;
- (iv) Undermining behaviour;
- (v) Irrational behaviour;

The additional allegation by the Second Defendant (in paragraph 6) is:

‘(vi) Instructing the Second Defendant, a non-smoker, to spend time each day with work colleagues (who were smokers) in an attic room set aside for smoking breaks.’

9. The Plaintiff has now sought, by *Exceptions* filed on the 15<sup>th</sup> April, 2005, extensive further and better particulars of the implied terms and the alleged breaches thereof by the Plaintiff. Responses have been filed, but the Plaintiff maintains the responses furnished are insufficient. The matter has again come before the Court on Advocate Edwards’ (now appearing for the Defendants) application to determine whether or not these further particulars should be ordered.

10. It is of interest that, when the Defendants’ application for particulars was being heard, Mr. Richardson made much of the fact that the Defendants were building a wall of applications for particulars, and had sought to shelter behind voluminous applications therefor. He then relied on the words of Collins J.A. in Van Leuven & Others v. Nielsen Civil Appeal 197 of 5<sup>th</sup> January 1993, as follows:

“.....the defendants appear to have concentrated upon seeking to undermine the Plaintiff’s case by their requests for particulars, and have contented themselves to

remaining behind the barricades so far as any expression of their own substantive defence to the case is concerned.....”

Now, in his letter of 20<sup>th</sup> April, 2005, Mr. Edwards makes a like observation:

“It is unfortunate that, rather than lodge a substantive Defence your client has chosen to shelter behind a ream of Exceptions de Forme.”

As in the case of the *Exceptions* pleaded by the Defendants, the Plaintiff has declined to file her Niances and Pretensions in response to the Counterclaim until after the particulars have been furnished.

11. I pause here to compare some of the requests for particulars now made with those sought of the Cause in the earlier proceedings. For instance, Request 2 of paragraph 3 of the Counterclaim seeks full particulars of the surrounding circumstances to support the allegations in sub-paragraphs (i) to (v) of the Particulars of Breach, including details of when and where the (Plaintiff’s) alleged behaviour took place. Request 4(b), in relation to paragraph 11.1 of the Cause, sought to ascertain *inter alia* ‘the facts, matters and circumstances alleged to support each of [the] breaches including the dates, times and places at which it is alleged that the breach or breaches occurred’.

12. To that request Mr. Richardson replied on 18<sup>th</sup> February, 2004:

“The Plaintiffs are unable to provide the details requested until after Discovery and/ or interrogatories. At this stage the Plaintiff objects to providing an Answer to the Request on the following grounds:

- (1) The matters are adequately pleaded;
- (2) The Requests involve matters of evidence to which the Defendants are not entitled.

It seems to me, although worded differently, that the two requests just referred to are, in essence, similar, save that I bear in mind that, whereas the relevant allegations in the Cause related to the conditions recited in paragraph 3, those with which I am now concerned relate to alleged breaches of terms said to be implied into the two contracts of employment.

13. I propose to address the issue of the implied conditions first. The Plaintiff’s request is:

“Please confirm the basis on which the First and Second Implied Terms are implied.”

14. With great respect, I do not consider the Defendants are entitled to particulars of this averment at this stage of the proceedings. In my judgment implied terms such as are pleaded in this part of the Counterclaim are a matter for submissions and argument at the trial. I would observe in this connexion that some of the conditions recited in the Cause are also implied, in the sense that they do not appear in the Agreements exhibited at TABs 5 and 6 of the Defendants’ bundle. For instance the condition set out in paragraph 3.1, namely:

“That the first Defendant and the Second Defendant would render honest and faithful service and would act with fidelity towards the Plaintiff.”

Is not to be found in either contract. It is a general term that may need stating, especially if, as here, it is relied on as a term implied in the contract of service. It is, however, one which no reasonable man would seriously suggest should be denied on the pleadings. It is in reality a different side of the same coin as that which is now being pleaded in the Counterclaim, which, similarly would be unlikely to be denied.

15. Fortunately, as regards the term in paragraph 3.1 of the Cause on which the Plaintiff relies, there is no dearth of authority, and, although that paragraph is not directly in point for the purposes of this Ruling, I propose to cite three authorities, which render the position clear. All relate to contracts of service and related acts of alleged disloyalty to the employer: beyond that I do not need to enter into the facts of each authority. First in point of time is Robb v. Green [1895] 2 QB 315. At pages 316-7 Lord Esher. M.R said:

“I think the judge was perfectly justified in holding that such conduct’ (copying the plaintiff’s list of customers with a dishonest intent) ‘was a breach of the trust reposed in the defendant as the servant of the plaintiff in his business. The question arises whether such conduct is a breach of contract. That depends on whether in a contract of service the Court can imply a stipulation that the servant will act in good faith towards his master.”

Later on the same page he said:

“...that is precisely the case in which’ [the Court] ‘ought to imply a stipulation.”

Still further on A.L.Smith L.J said at page 320:

“I think it is a necessary implication which must be engrafted on such a contract’ [of service] ‘that a servant undertakes to serve his master with good faith and fidelity”

16. Robb v. Green was followed in Hivac v. Park Royal Scientific Instruments Ltd [1946] 1 Ch 169 in which Lord Greene M.R said at page 174:

“It has been said on many occasions that an employee owes a duty of fidelity towards his employer. That is indisputable.”

Again in Sanders v. Parry [1967] 1 WLR 753 at page 765 Havers J.said:

“I am satisfied that in accepting the offer’ [by a wealthy client of the solicitor/employer that he would transfer all his legal work from the plaintiff to the defendant], ‘by such conduct the defendant was guilty of breach of duty in regard to the agreement implied therein by law that the defendant would serve the plaintiff with good faith and fidelity.”

17. In view of the foregoing, while it was perfectly proper to plead the implied duty of fidelity, there seems to have been no purpose in the Defendants seeking particulars of paragraph 3.1. But can the converse be implied into the contract, that is to say that there are terms which should be implied correlative to those in the Cause, namely paragraphs 2(i) and 2(ii) of the Counterclaim?

18. I have no doubt that if those questions had needed to be addressed in Robb v. Green, Hivac v. Park Royal Scientific Instruments Ltd, or Sanders v. Parry, the answer would clearly have been that, given the duty of fidelity by an employee, the law would, equally, imply terms requiring the employer to provide a reasonably suitable working environment to enable an employee to carry out his or her duties properly, and that the employer would not behave in a way likely to destroy or damage the relationship of trust and confidence between the employer and his or her employees. I therefore agree with the Defendants’ res-ponse to this request as indicated in paragraph 6.3(i) of their skeleton argument.

19. Before turning to the Defendants’ further requests for particulars I propose to refer to that which I conceive to be the law regarding further and better particulars. In my Ruling of 1<sup>st</sup> October, I was concerned not only with the principles relating to particulars generally, but also as to whether they should be ordered before the filing of the Defence (in order, as it is often put) to enable the opposite party to plead to the same, but also whether

they should be ordered before discovery. As Collins J.A said in the Van Leuven case, it is more usual to order discovery before further and better particulars, but he went on to say that each case depends on its own circumstances.

20. I take first the Guernsey case of Chadwick v.Lovell [1985] 29<sup>th</sup> October. That was an action for damages for professional negligence by a firm of Architects and Surveyors. The Court accepted the submission by both Counsel that the English authorities on Order 18 Rule 12 R.S.C. (at TAB 5 and TAB 3 of the respective Bundles) were appropriate as providing guidelines on which the Royal Court would act in determining in each case whether the particulars given were sufficient to provide the defendants with adequate details so as to enable them to prepare their defences.

The only wording of Rule 12 which is relevant for present purposes appears at the beginning of the Rule, to this effect –

“.....Every pleading must contain the necessary particulars of any claim, defence or other matter pleaded.....”

Since 1995 it has been accepted by the Royal Court that the six functions of particulars set out at paragraph 18/12/1 in the Commentary in the 1999 White Book are the appropriate principles to apply on an application of this kind in Guernsey. They are:

- (1) To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved.
- (2) To prevent the other side from being taken by surprise at the trial.
- (3) To enable the other side to know with what evidence they ought to be prepared and to prepare for trial.
- (4) To limit the generality of the pleadings or of the claim or the evidence.
- (5) To limit and define the issues to be tried and as to which discovery is required.
- (6). To tie the hands of the party so that he cannot without leave go into any matters not included.

21. Since my Ruling of 1<sup>st</sup> October last I have remained of the opinion that the interpretation of those principles as expressed by Day D.B. in Tulip Holdings Ltd. v. Orthocentre N.V. [2000] 28<sup>th</sup> June, represents the law that should be applied. After setting out the Commentary in the White Book to which I have just referred, Day D.B. said at page 3:

“It seems to me clear from these quotations that the fundamental purpose of the pleadings is to identify clearly the issues which are to be in contest between the parties and which have to be investigated by the court. Further particulars of those issues may become necessary, so as to ensure that the litigation and particularly the trial is conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs. Provided the issues have been clearly established by the pleadings to enable the other party fairly to plead to them, then the furnishing of those further particulars properly form part of the various processes which are available after the pleadings have closed.”

22. Both Mr. Richardson and Mr. Edwards referred to the case of British Airways Pension Trustees Ltd v. Sir Robert McAlpine & Sons Ltd [1994] 15<sup>th</sup> December. I set out a passage from Saville L.J’s judgment at para-graph 28 of my earlier Ruling. I have no hesitation in adopting that passage again, and in emphasising the concluding sentence at page 7 which I now repeat:

“I remain unpersuaded that either McAlpines or PDP were put to any unfair disadvantage by the way the matter had been set out by the plaintiffs.”

23. I apprehend that is the question I have to ask myself here—will either side be put at an unfair disadvantage by the way this matter has been set out in the counterclaim? In this respect I quote from Rule 18/7/11 in the White Book, which is included at TAB 2 of the Defendants’ Bundle:

“It is essential that a pleading, if it is not to be embarrassing, should state those facts which will be put those against whom it is directed on their guard and tell them what is the case they will have to meet.”

24. Mr. Edwards highlighted the passage in Saville L.J.’s judgment in the British Airways case when he said that particularisation is often sought when it is not really needed, which is costly and he continued at page 6 of the judgment:

“[and] ‘is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it.’”

Saville L.J then adds, as has been said in our Court of Appeal:

“Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to an end, and that end is to give each party a fair hearing.”

Mr. Edwards said that that passage epitomised his case, which is that all the parties involved knew very well what each had done, and particulars would not carry the matter any further.

25. Applying all the above principles I do not consider that the particulars purportedly given in the body of the Counterclaim are sufficient to give the Plaintiff adequate information as to the case she will have to meet by her substantive Defence to the Counterclaim. The different kinds of behaviour specified in the Particulars of Breach numbered (i) to (v) under paragraph 3 merely place the behaviour complained of into certain categories. They are *types* of the behaviour which are said to constitute the alleged repudiatory breaches of the First Implied Term, and are not particulars at all.

26. While I agree with Mr. Edwards that it cannot reasonably be expected that his clients should remember each and every instance of, for example, bullying or undermining behaviour said to have been indulged in by the Plaintiff over a period of, in one case about nine months, and in the other ten months, I am unable to agree with him that the matters set out under the heading ‘Particulars of Breach’ in Paragraph 3 are sufficient to give the other side a fair idea of the case it will have to meet on the Counterclaim.

27. I consider some effort should be made to give instances of each type of the behaviour alleged. In my view it is reasonable for the First Defendant to furnish three or four *specific* instances of the type of conduct which caused her to seek other employment. When that has been done, it is then, in my view, perfectly reasonable to add some such rider as:

“.....and on other occasions too numerous to specify.”

—if that be the case—as in the former adversarial divorce cases when some instances of alleged cruelty were given, and the others encompassed in a more general averment.

28. I take the same view regarding (i) and (ii) of paragraph 4, with which is bracketed Request number 3. As regards sub-paragraph (iii) it must be possible for the First Defendant to give more precise details of the instructions alleged, and I direct that this should be done. I take the same view as regards sub-paragraph (iv) and (v).

29. Coming to paragraph 6 and Request 4, that which I have said touching the types of behaviour alleged by the First Defendant applies also to the Second Defendant in the case of sub-paragraphs (i) to (v). As to (vi), I consider the request as far down as ‘for smoking breaks;’ is admissible and must be complied with. The remainder of Request 4 was not alleged in the sub-paragraph and should not be answered.

30. Lastly paragraph 7 with which is bracketed Request 5. As to sub-paragraph (i), I take the same view as regards this Defendant as I have expressed in relation to paragraph 4 (iii), (Request 3), and the First Defendant, and so order. That which I have said regarding paragraph 4 (v) applies also to sub-paragraph (ii) of paragraph 7. As regards 7 (iii), this is clearly capable of being particularised, and I order that Request 5 (c) shall be answered as far down as ‘this alleged conduct took place’. Its alleged relevance is a matter for argument at a later stage.

31. Subject to Counsel’s views I propose to reserve the costs of this application.

32. Orders accordingly.

A.R.W.Hancox  
Lieutenant Bailiff  
22<sup>nd</sup> July 2005