

Judgment 52/2007

**F v G – Royal Court (Civil Action File 989) –
30 November 2007**

**Royal Court Civil Rules, 1989 (Rule 35) – application to amend cause –
circumstances in which amendment of pleadings may be permitted**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Between

F

Applicant

V

G

(1,2 and 3)

Respondents

Application heard on: 21st November 2007

Date Judgment handed down: 30th November 2007

Before: John Russell FINCH Esquire, Lieutenant-Bailiff

Advocate for Applicant.:

Advocate C H Edwards

Advocate for the First Respondent:

Advocate C Hay

Advocate for the Second & Third Respondents:

Advocate M G A Ferbrache

Cases referred to:

1. Butt v Brannan (2004) (Civil Action No. 415, Royal Court).
2. E, D & F Man Sugar Ltd v Kryton Lendoudis [2007] EWHC 2268.
3. Norwich Pharmacal Co v Customs And Excise Commissioners [1974] AC 133.
4. Ogier v Grand Harve Holdings Ltd (2000) 29 G.L.J. 641.
5. Totalise plc v The Motley Fool Limited and Interactive Investor Limited [2001] EWCA Civ 1897.

Textbook referred to:

The White Book (2007) Vol 1, para 3.42, page 102; para 17.4.4, pages 425 – 427.

Legislation referred to:

The Royal Court Civil Rules, 1989, Rule 35.

The Lieutenant Bailiff summarised the Submissions and the applicable legal principles as follows: -

Submissions

6. The parties came before the Interlocutory Court on 16th November 2007. I ordered that the application would be heard on 21st November, 2007 and requested Skeleton Arguments in advance. The oral submissions were broadly in line with the Skeleton Arguments, although Advocate Ferbrache's approach involved a more detailed examination of the whole case [.....].
7. Advocate Edwards suggested that the proposed changes were "*relatively minimal*". He based his submissions on the Guernsey Court of Appeal case of *Ogier v Grand Havre Holdings Limited (2000)*, as applied in the Royal Court in *Butt v Brannan (2004)*. The relevant passage is from the judgment of Sumption J A (p 42 of the G.L.J. at C – E):

"Whether a litigant (represented or unrepresented) should be allowed to amend his pleadings depends on what justice requires in the particular case. Over elaborate definition is probably undesirable. It is enough for present purposes to make three points, which broadly reflect the existing practice of the Courts of this Island. The first is that in the ordinary course it will not be just to allow an amendment if it would defeat a plea of prescription that would otherwise be available to a Defendant. This is a principle on which the English Courts acted for many years at a stage when their rules were no more elaborate than those of Guernsey are now. Secondly, an amendment should not be allowed if the case introduced by it can be seen to have no realistic prospect of success. The test for this purpose is the same as the test for striking out an existing pleading under Rule 36 of the 1989 Rules. Thirdly, apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend, provided that the change can be made without inflicting injustice on other parties of a kind incapable of being compensated by an order for costs."

8. Advocate Edwards submitted that any points on forum could be reserved until a later stage in the proceedings; that the claim was not a fanciful one; that the parties and issues remain the same and that if refused, P risks suffering irreversible prejudice. Ultimately it is a matter for the discretion of the Court, there was good prima facie evidence in P's favour. He pointed out that D2 and D3 had applied to be joined to the proceedings and that P was entitled to trace the funds. Advocate Ferbrache took me through the correspondence and allied documentation. He asked why D2 and D3 should have to fight the same issues in two jurisdictions at the same time. The burden is on P to satisfy the Court that he should be allowed to issue these proceedings and that the matter is properly justiciable. In effect, the application as it stands is a form of pre-action discovery, a search for information where substantive proceedings have not been issued. P is saying that he should be dispensed from service; but it is

not a good and arguable case. This was never a substantive action against D1, more a *Norwich Pharmacal* type Order (see para 13 of Advocate Ferbrache’s Skeleton Argument).

9. Advocate Ferbrache developed the argument set out at paragraph 14 of his Skeleton that the original application:

“Cannot be amended to plead a substantive cause of action, as it was not a substantive cause to begin with.”

Any cause of action should like against the estate, not D2 and D3. The application to amend the original application is, according to paragraph 18 of the Skeleton:

“an attempt to circumvent the procedure of issuing substantive proceedings”

Applicable Legal Principles

10. The guidance given by the Guernsey Court of Appeal in the *Ogier* case (supra), was followed by Talbot LB in *Butt v Brannan*, and is binding upon me. Those principles should therefore be applied in the present application. It is worth stressing what Sumption J A said at the beginning of the relevant passage, as this is really the basis of the test the Court has to apply:

“Whether a litigant (represented or unrepresented) should be allowed to amend his pleadings depends on what justice requires in the particular case. Over elaborate definition is probably undesirable.”

The three heads referred to may be broadly summarized as:

- (i) Prescription;
 - (ii) realistic prospect of success;
 - (iii) injustice or prejudice to Defendants.
11. The proposed claim is not prescribed (paragraph 15 of P’s Skeleton); although there are possible problems looming ahead (paragraph 18 of D2 and D3’s Skeleton).
12. Although D2 and D3 submit there is no realistic prospect of success, P considers the claim is *“not fanciful”*. At present, with the alleged facts available, I do not think it can be said that there is not a serious live issue of fact which can only be properly determined by hearing oral evidence; nor can it be said that on what is before the Court the claim is bound to fail (see para 3.4.2. page 102 of the White Book for relevant English cases and commentary). At this stage these points need not be ventilated further. It is appreciated that P may face substantial procedural and/or factual obstacles, but the test is a stringent one. This is not a *“fanciful”* claim at this juncture.

13. It is the last point which has caused me the greatest concern. Advocate Ferbrache has expressed very firmly his contention that permitting this amendment is, in effect, one or more steps too far – see paragraph 9 above. There was no substantive action to begin with, so no amendment is possible. The original application was, according to his submissions (see paragraph 12 of his Skeleton), a *Norwich Pharmacal* application and therefore a form of pre-action discovery. This type of application is to obtain disclosure of the identity of wrongdoers from a person who, through no fault of his own (and whether voluntarily or not) has got mixed up in the tortuous acts of others. The problem with this, in my judgment, is that P’s original application is not how this type of order is general understood, but a request for information from the Administrator of an estate. Accordingly, the observations made by Advocate Edwards both orally and at paragraphs 12 and 18 of his Skeleton, seem to have some merit. In particular, I accept that:

“The proposed amendments arise from the same set of facts and involve the same parties”.

It must also not be forgotten that D2 and D3 were joined to the proceedings at their own request.

14. Nevertheless, were it not for the guidance offered by Sumption J A, quoted at paragraph 7 above, there would be some difficulty in making the leap from P’s original application to what is sought now. The proposed application would, at the least *“substantially alter the character of the proceedings”*. Nevertheless, the parties and the main issues remain the same. Any injustice to D2 and D3 is capable of being remedied in due course, when the question of costs comes up for consideration. Although none of the English cases described at paragraph 17.4.4 of the present edition of the White Book are directly on this particular point, the principles expressed are analogous and tend to support this approach, in my view. The modern decisions demonstrate a more flexible way of dealing with these complex issues than when there was a more formalistic ritual on pleadings.

Decision

15. Accordingly, P’s application for leave to amend the cause is granted.

Costs

16. Whilst I am fully aware of the costs situation, it seems better in the (technically speaking) early stages of this litigation to reserve the position until there is further progress.