



Fairhead et al and Praxis Holdings et al
Royal Court
2nd April, 2014

JUDGMENT
13/2014

Application for leave to amend Cause pursuant to rule 59 of the Royal Court Civil Rules, 2007.

Approved Text
02.04.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

(1) NIALL FAIRHEAD

(2) DUBLIN LAND SECURITIES LTD

Plaintiffs

AND

(1) PRAXIS HOLDINGS LTD

(2) PRAXIS FUND SERVICES LTD

(3) PRAXIS WEALTH SOLUTIONS LTD

(4) DAVID BREUER-WEIL

(5) IAN DE FEU

(6) DR CLARE McANDREW

(7) MICHAEL BRIAN McKEE

(8) MARY NELL BROWNING

(9) ROY LESLIE PETLEY

(10) SEPHAR LTD

(11) DR SIMON JOHN THORNTON

(12) JUSTIN WILLIAMS

Defendants

Hearing dates: 7th March 2014 (PM), 10th March 2014 (PM)

Judgment handed down: 2nd April 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiffs:

Advocate N J Barnes

Advocate for the First, Second,

Third, Fifth and Eleventh Defendants:

Advocate R G Shepherd

Cases & legislation referred to:

The Royal Court Civil Rules, 2007

De Carteret v Mann (10 March 2006); [2005-06] GLR Note 18

Jefcoate v Spread Trustee Company Limited [2013-14] GLR 220

Ogier v Grand Havre Holdings Limited (2000) 29.GLJ.80

Holdright Insurance Company Limited v Willis Corroon Management (Guernsey) Limited (unreported, 25 August 2000)

Public Services Committee v Maynard 1996 JLR 343

Boyd v Pickersgill 1999 JLR 284

Yaddehige v Credit Suisse Trust Limited [2007-08] GLR 282

Introduction

1. The Plaintiffs commenced proceedings against the Defendants in July 2013. The Cause was first tabled against some of the Defendants on 26 July 2013. On the same date, applications for leave to serve the non-resident Defendants out of the jurisdiction were also made. The Ninth Defendant has still not been served. There was an element of urgency to commence these proceedings at that time because some of the events took place in 2007, with the consequence that the Plaintiffs recognised the possibility of prescription being raised against their claims.
2. The Plaintiffs are able to institute these proceedings by virtue of the causes of action vested in Art Investment PCC Limited and Art Trading Limited having been assigned to them by the joint liquidators of those two companies on 11 June 2013. The joint liquidators had been appointed on 28 May 2013 following periods of approximately three years during which the companies had been subject to administration orders. The Plaintiffs also bring their claim in their capacity as investors in the Fund operated by the two companies.
3. Following his preparation of the Cause on behalf of the Plaintiffs, it soon became clear to Advocate Barnes that it would benefit from amendment. As Advocate Shepherd acknowledged on behalf of those Defendants opposing the Application (ie, the First, Second, Third, Fifth and Eleventh Defendants, to whom I will refer as “the opposing Defendants”), when timescales are compressed, as they were in the summer of 2013, problems can arise. Indeed, by letter dated 13 August 2013, Advocate Shepherd had written to Advocate Barnes commenting that there were “*various aspects of the Cause which are unclear, plainly errors, or insufficiently pleaded to enable our clients to file a coherent defence*”, enclosing a Request for Further and Better Particulars.
4. The Application pursuant to rule 59 of the Royal Court Civil Rules, 2007 seeking leave of the Court to amend the Cause in the manner proposed is dated 22 November 2013. It was first before the Court on 29 November 2013. However, Advocate Barnes also seeks to rely on an earlier application dated 2 September 2013, which he provided to the Defendants' Advocates under cover of a letter dated the same date, but received the following day. That letter attached an Amended Cause, but did not indicate any date on which that application would be placed before the Court.
5. The evidence in support of the Plaintiffs' Application is contained in Affidavits sworn by Advocate Barnes on 3 December 2013 and 17 February 2014. On behalf of the opposing Defendants, an Affidavit sworn by Sally French on 28 February 2014 has been filed.
6. Advocate Shepherd responded on 4 September 2013, confirming receipt of the Plaintiffs' “*application to amend the Cause and marked up Cause*”, adding that there was no indication as to whether Advocate Barnes was seeking the Defendants' consent to the proposed amendments or when he was seeking to list that application, and asking for confirmation of his intentions. When Advocate Barnes wrote to Advocate Shepherd on 12 September 2013,

he addressed a number of issues, and enclosed the Plaintiffs' response to the Request for Further and Better Particulars, but omitted to respond to the enquiry about the Plaintiff's intentions in relation to the application to amend the Cause dated 2 September 2013. The issue was also not mentioned in Advocate Shepherd's reply dated 26 September 2013, although a Second Request for Further and Better Particulars was enclosed in an attempt to get sufficient information about the Plaintiff's action to enable the opposing Defendants to plead to it.

7. The Fourth and Tenth Defendants in the proceedings are separately represented. Their Advocates sent an e-mail to Advocate Barnes dated 27 September 2013 indicating that they did not object to the Plaintiffs' application dated 2 September 2013, inviting Advocate Barnes to forward a Consent Order so as to enable the application to be "*dealt with sooner rather than later*" so that those Defendants would "*know which Cause they are answering as soon as possible*".
8. By letter dated 7 October 2013, a colleague of Advocate Shepherd wrote to Advocate Barnes in some detail about the proposed amendments and the objections being raised to some of them. The position being taken was summarised as being: "*If the Cause is to be amended then a comprehensive review of the Cause at this stage in the proceedings would be preferable to the piecemeal amendment as the action progresses.*" Advocate Barnes responded on 29 October 2013, enclosing the Plaintiffs' reply to the Second Request for Further and Better Particulars. On 21 November 2013, Advocate Barnes asked the Advocates representing all the Defendants whether or not they had any objection to the proposed amendments to the Cause, as they had developed through various iterations during September and October 2013, and sent a short letter dated 22 November 2013 attaching the Application of that date, indicating on this occasion that he proposed to lodge it in the Interlocutory Court the next Friday, which he duly did.

Issues

9. Many of the amendments proposed in the latest version of the Amended Cause, to which the Application relates, have been consented to by the Defendants. Indeed, because all the amendments that affect the Fourth and Tenth Defendants are accepted, as had been indicated in the e-mail from those Defendants' then Advocates on 27 September 2013, I excused Advocate Laws from attending the hearing. As a result of this level of agreement, there were just three changes that were not being consented to on behalf of the opposing Defendants, which had been clearly identified in a letter dated 26 November 2013, being the proposed amendments to paragraphs 48.2, 53 and 53 of the Amended Cause attached to the Application.
10. During the course of the hearing, the opposition to the insertion of paragraph 48.2 was withdrawn because Advocate Shepherd hoped that, through further dialogue, he and Advocate Barnes would be able to find a form of words to which no objection would be raised. In those circumstances, the parties agreed to adjourn that element of the Application with liberty to restore it, should the need arise. Accordingly, the only changes proposed on behalf of the Plaintiffs for which leave is required are those to paragraphs 53 and 54. Advocate Barnes has accepted that these paragraphs raise new causes of action which were not pleaded in the original Cause he settled. The basis of the Defendants' opposition is that such new causes of action should not be permitted to be added to the Cause by virtue of this Application because they have not been raised within the relevant prescription periods. The key dates for that purpose are six years after the acquisitions of the two art collections in question, known as the Baudoin and Living Artists Collections, on 7 September and 5 October 2007 respectively. Advocate Barnes has argued that his reliance on the initial application is such that these changes were first intimated before prescription offered any potential defence to the Defendants or, in the alternative, that the Plaintiffs can rely on being *empêché d'agir* with the

consequence that the amendments should still be permitted, enabling the question of whether or not *empêchement* existed to be resolved at a full hearing.

Making of application

11. Advocate Barnes' primary contention is that the opposing Defendants cannot now raise the possibility that they will lose a prescription defence because the proposed amendments were first raised in the version of the Amended Cause supplied in early September 2013. Advocate Shepherd draws a distinction between the correspondence in September and the letter of 22 November 2013 when Advocate Barnes indicated that the Application would be made at the following week's Interlocutory Court. He has also highlighted the fact that the application to amend the Cause was not served through the office of H.M. Sergeant.
12. Had Advocate Barnes written more expansively on 2 September 2013, it is possible that there would have been no dispute about whether the Defendants can avail themselves of a prescription defence. For example, had the covering letter expressly indicated that Advocate Barnes was inviting the Defendants to consent to the amendments proposed, failing which the enclosed application would be tabled at a specified Interlocutory Court, perhaps thereby enabling the parties to agree to delay matters by way of a Consent Order in the meantime, I am confident no opposition would, or could, have been raised.
13. Advocate Shepherd's complaint is that there had been no agreement on behalf of the opposing Defendants to accept service of applications informally by way of e-mail. In his submission, a proper notification through service by H.M. Sergeant would have confirmed that good service had been effected. In return, Advocate Barnes has relied on what Deputy Bailiff Collas (as he then was) stated in *De Carteret v Mann* (10 March 2006 and [2005-06] GLR Note 18):

“13. I am aware from my time in private practice (and I am sure that the position has not changed in the short period since I have retired) that there is a general understanding between Advocates that documents can be served on Advocates' offices by e-mail, fax or hand delivery. To do so saves clients expense of paying a fee to HM Sergeant. It also saves the staff of HM Sergeant and HM Sheriff from having to spend time serving documents on Advocates' offices, thereby freeing HM Sheriff's staff to carry out their other duties.

14. I will therefore accept that the service by fax was sufficient on this occasion. However, if there is any doubt between Advocates as to the manner in which documents are to be served in future, Advocate Barnes will be well advised to clarify it with Advocate Gomoll, and perhaps with other Advocates, so that there will be no doubt as to service on future occasions.”

Although a further 8 years have passed since those comments were made, I consider that they are equally applicable today as they were then. I do not consider that the making of the 2007 Rules in the meantime has affected the position.

14. For my part, therefore, I am prepared to find that there is no absolute requirement for service of a document to be effected through the office of H.M. Sergeant. If there is the possibility that proceedings will need to be progressed without another party attending, it is necessary to be able to demonstrate good service has been effected and that is most readily done through H.M. Sergeant's relation. I do not agree with Advocate Barnes' submission that significations are only used where a party is unrepresented. A signification may be necessary where proof of service is potentially going to be an issue, eg, as suggested in paragraph 14 of *De Carteret v Mann* (*supra*), where an Advocate has checked with another Advocate as to whether service will be accepted by other methods and has been informed that it will not.

15. In a situation such as that in which Advocate Barnes found himself at the beginning of September 2013, I accept that the practice at the Guernsey Bar is to make use of Advocate-to-Advocate communications of the type used by him. There is support for that conclusion in the stance taken on behalf of the Forth and Tenth Defendants, because a Consent Order could hardly have been proposed if their Advocates did not think that an application to the Court was already in train. This is a cost-effective manner of proceeding and has the additional benefit of not over-burdening the staff working for H.M. Sheriff and H.M. Sergeant. The purpose of service is to bring a matter to the attention of another party in a manner adequate to enable him to respond or to enable the party serving the document to proceed in the recipient's absence. If that is done in such a way that the other party acknowledges receipt, as was the case here, there is evidence of having effected service. To that extent, Advocate Shepherd's letter of 4 September 2013 confirms that the opposing Defendants had been adequately notified of the Plaintiffs' wish to amend their Cause before either of the new causes of action in paragraphs 53 and 54 of the Amended Cause could be resisted through a prescription defence.
16. That said, the brevity of Advocate Barnes' letter dated 2 September 2013 and his failure to respond to Advocate Shepherd's enquiry about the Plaintiffs' intentions add further complications, which may have been avoided had Advocate Barnes recalled the advice from *De Carteret v Mann* (*supra*) to clarify the position first. In effect, I have to consider whether the Plaintiffs should now be penalised for not indicating at the time the Interlocutory Court at which the application seeking leave to amend would be made.
17. In my view, the opposing Defendants' Advocates quite properly engaged in correspondence with Advocate Barnes inviting him to take steps to re-cast the Cause in such a way that it became more coherent and contained material to which they could respond in their clients' Defences. This is consistent with the overriding objective, (see, especially, rule 1(4) of the 2007 Rules) and the two-stage process envisaged by rule 59: if all parties to a matter consent to the amendment of a pleading, there is no need to seek the leave of the Court. Consequently, had the three amendments to which the opposing Defendants objected been resolved through correspondence, the Cause would have been capable of being amended without the Court even being seized of any application. Having reviewed the correspondence passing between the parties' Advocates in some detail, I am satisfied that when Advocate Barnes began the process through sending his letter of 2 September 2013, he was inviting the consent of the Defendants to the proposed amendments, failing which he had at the same time informally served an application to the Court to seek leave to make any amendment not agreed. Further, I accept that he combined both stages in the single letter because he was conscious that the end of the prescription period was imminent and take the view that Advocate Shepherd must have been aware that this was the reason for acting as Advocate Barnes did.
18. To that extent, had the application dated 2 September 2013 been put before the Court, rather than the later Application dated 22 November 2013, albeit with Advocate Barnes wishing to amend the application to refer to a slightly differently worded Amended Cause, the issue of prescription would not have come to the forefront in the same way that it now has. Albeit that rule 89 of the 2007 refers to the commencement of actions, I take the view that the principles enshrined in it can be read across to the timing of making applications. Consequently, if a signification is handed to H.M. Sergeant for service, that act fixes the date at which the proceedings relating to that application commence and, in accordance with rule 89(3), if the application is notified to an Advocate because there is agreement from that Advocate to accept service, whether expressly or tacitly through the practice confirmed in *De Carteret v Mann* (*supra*), should the timing of the making of the application be relevant, that is the date on which time crystallises. Following that approach, I consider that the notification given to Advocate Shepherd on behalf of the opposing Defendants and the correspondence that followed, culminating in the need to progress an application pursuant to rule 59 of the 2007 Rules in November 2013 when it became apparent that full agreement on the amendments

proposed could not be reached, was, having regard to all the circumstances of this case, adequate notification. In reaching that conclusion, I am satisfied that the opposing Defendants have not been prejudiced because throughout that time they have been seeking to exercise influence to secure clarification of how the Plaintiffs' case is to be pleaded.

19. In the light of that conclusion, the opposing Defendants arguments about the new causes of action potentially being prescribed fall away and the question of whether leave to amend should be granted turns on the usual test of what justice requires.

New causes of action and prescription

20. Having reached the conclusion I have as to when I should determine the date of making the application to amend as having been, I do not need to consider in detail the arguments advanced by Counsel on the question of whether the proposed amendments to paragraphs 53 and 54 of the Amended Cause should be rejected because the inclusion of those new causes of action may defeat a defence of prescription. However, in the event that I am wrong to have decided that the commencement of the application to amend can be treated as having taken place before the expiry of the prescription periods, I will briefly set out my conclusions on those submissions.
21. The matters relevant to this issue were addressed in considerable detail in the recent judgment of Bailiff Collas in *Jefcoate v Spread Trustee Company Limited* [2013-14] GLR 220. So as to avoid the consequences of that decision, Advocate Barnes submitted that the Bailiff had erred in his reasoning at para. 97 through misquoting the test he was bound to apply following from the Court of Appeal's decision in *Ogier v Grand Havre Holdings Limited* (2000) 29.GLJ.80. The passage in question came from the judgment of the Court delivered by Sumption JA (as he then was):

“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 for by an order for costs.”

At para. 97 of the *Jefcoate* case, the Bailiff stated:

“Where a plaintiff seeks to add a new cause of action to an existing cause, the test to apply is that laid down in Ogier; the amendment will not be allowed if it might deprive the defendant of a limitation defence. In other words it is necessary to look at a defendant's case at its highest to see if it may have a limitation defence. If a plaintiff's case had been pleaded in the proposed amended terms from the outset of the case, the correct approach would have been to take the plaintiff's pleaded case at its highest and apply the test laid down in Cherub as to whether an exception de fond may exist.”

22. Advocate Barnes submitted that the conclusion reached should not have differentiated between the two tests and that both should approach the question on the basis that the plaintiff's pleaded case should be taken at its highest. He also criticised the substitution of "would" with "might" in the test derived from the *Ogier* case (*supra*). Further, because the question of whether a cause of action is prescribed or is saved by application of the doctrine of *empêchement d'agir* is so highly fact-sensitive, the proper course of action would be to follow what Deputy Bailiff Day suggested in *Holdright Insurance Company Limited v Willis Corroon Management (Guernsey) Limited* (unreported, 25 August 2000), namely to allow these matters to be resolved at trial after full consideration of the evidence. This would be done by permitting the Cause to be amended in the manner proposed, seeing whether any prescription defence is raised on behalf of the Defendants and allowing the Plaintiffs to counter such a defence by pleading the doctrine of *empêchement d'agir* in their *Réplique*.
23. Conversely, Advocate Shepherd submitted that the approach taken by the Bailiff in the *Jefcoate* case (*supra*) was the correct approach and meant that the Court was bound to reach a conclusion on whether the causes of action proposed to be added to the Plaintiffs' Cause were prescribed or saved by the doctrine. In doing so, the focus should be on whether or not the test derived from the Jersey cases of *Public Services Committee v Maynard* 1996 JLR 343 and *Boyd v Pickersgill* 1999 JLR 284, which was adopted and applied in *Yaddehige v Credit Suisse Trust Limited* [2007-08] GLR 282, being the leading case relating to *empêchement d'agir*, requiring a plaintiff to demonstrate there was an impediment creating a "practical impossibility", in the sense of "what is in fact, not in theory, possible", has been satisfied.
24. It was acknowledged by Counsel that a previous decision of the Royal Court does not bind me in the present case. However, the decision of the Court of Appeal in the *Ogier* case (*supra*) is binding on this Court and must be applied. It is, therefore, open to me to take a different approach to that of the Bailiff or, indeed, to that of Deputy Bailiff Day in the *Holdright* case and I would do so in any case where I considered that to be the proper course of action, explaining my reasons for doing so. However, I do not need to follow that path in this case because I concur in the approach taken by the Bailiff to the issues raised and gratefully adopt the summary he gave at para. 52 in *Jefcoate* (*supra*):

"Applying the authorities to which I have referred, I summarise the approach of the Guernsey Courts to amendments in the following way:

- (a) The Court has a wide discretion under RCCR 59 to permit amendments where one or more of the parties have not consented.*
- (b) The discretion must be exercised judicially having regard to legal principles.*
- (c) The overriding objective requires that cases be dealt with justly.*
- (d) What justice requires depends on the circumstances of the particular case but includes taking account of the matters particularised in RCCR 1(2), which will be of special importance when a late amendment is sought.*
- (e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.*
- (f) In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.*
- (g) If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.*

- (h) *What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of action already pleaded, the Court will not normally regard it as a new cause of action and hence will have a discretion to allow it.*
- (i) *However, even if the new cause of action arises from similar, or substantially the same, facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.*
- (j) *Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application although if the amendment is permitted, the effect is that it is deemed to date back to the date if [sic] the original proceedings.*
- (k) *When considering the limitation period, it is necessary to have regard to any period of time during which the plaintiff was empêché d'agir.*
- (l) *An amendment will not be allowed if the case introduced by it has no realistic prospect of success.*
- (m) *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 the other parties of a kind incapable of being compensated by an order for costs."*

This summary clearly applies the various elements derived from the *Ogier* case and, in my view, using “*might*” (as in para. 97) or “*will*” (as in this paragraph) does not dilute the original use by Sumption JA of “*would*”. In a case such as this, the Court has to consider whether a defendant appears able to raise a valid prescription defence by taking that defendant’s position viewed in the best light on the material before it, then proceeding to consider whether the plaintiff can deploy the doctrine of *empêchement* to reverse the defendant’s potential prescription defence.

- 25. In the present case, Advocate Barnes has conceded that paragraphs 53 and 54 of the proposed Amended Cause attached to the Plaintiffs’ Application contain new causes of action. Paragraph 53 amounts to a substitution, with the new allegation, if permitted, being a further claim in negligence or breach of contractual duty, which is the general basis of the Plaintiffs’ action, this time being for failing to tell investors about one of the directors having resigned, the reasons for it and how that should have affected the decision to acquire the Baudoin collection. Paragraph 54 inserts a new allegation, also of negligence or breach of contractual duty, relating to the failure to obtain the consent of the investors/shareholders before acquiring the Living Artists Collection arising from the purported need to obtain that consent because of the way the current Ninth Defendant, who has yet to be served and so appear in the proceedings, disposed of his shareholding.
- 26. In relation to both of these allegations, the later of the two Affidavits of Advocate Barnes explains why the matters addressed in these two paragraphs were not readily discoverable until after the original Cause was pleaded. The material relating to the allegation proposed to be pleaded as paragraph 53 did not feature in the papers of the companies which the Plaintiffs obtained from the joint liquidators, which in turn had been in the hands of the companies’ administrators for the preceding three years. It only came into the Plaintiffs’ hands when

supplied by the current Seventh Defendant, who is to be removed as a party through the amendments to which all parties have consented. In relation to paragraph 54, Advocate Barnes has pointed to there being inconsistent minutes of the two companies about the shareholding position, where those meetings were held within one hour of each other, which, when viewed in the light of events at a further meeting within a fortnight, mean that the Defendants concealed the true position, which was only unearthed “*on a close inspection of the company documents*”.

27. For present purposes, the date of the Application is taken as being after the six-year prescription period, meaning that the opposing Defendants have a *prima facie* prescription defence available to them. Bearing in mind that paragraph 52(k) of the *Jefcoate* decision directs that, in considering this prescription period, it is necessary to have regard to whether the Plaintiffs were *empêché d’agir*, I have applied the test of “*practical impossibility*” to this question, based on the explanations given in Advocate Barnes’ Affidavit.
28. Whilst fully appreciating that Advocate Barnes was conscious of the need to plead the Plaintiffs’ case within a short timeframe following receipt of instructions, because the causes of action were only assigned shortly before the sixth anniversary of the events in question, in relation to the new cause of action proposed as paragraph 54, the documents in question were still placed in the Plaintiffs’ hands at that date and so were capable of being reviewed before the six years expired. In those circumstances, I would not have been able to find that there was any factual impossibility preventing the cause of action being incorporated before the expiry of the prescription period. As such, I would not have permitted the proposed paragraph 54 to be inserted into the Amended Cause because to have done so would have defeated the opposing Defendants’ prescription defence.
29. Turning to substituted paragraph 53, I would have been slightly more troubled about this because the documents provided by Mr McKee after receiving the Summons were not within the paperwork received from the liquidators of the company by the Plaintiffs. That omission is arguably sufficient to be the type of practical impossibility envisaged, which has the effect of stopping time running. However, I take the view that there is a difference between entirely fresh information coming to light and information that could have been ascertained had steps been taken to elicit it. In that regard, I would have accepted the submission of Advocate Shepherd that the cause of action had been in existence for a number of years and, in particular, during the entirety of the time that the two companies’ affairs were in the hands of the administrators and then the joint liquidators. It is, therefore, a fact, rather than theory, that steps were capable of being taken during that time to enquire of others, including Mr McKee, about the circumstances surrounding his resignation as they affected the acquisition of the Baudoin Collection. Accordingly, those in whom this cause of action vested were, in my opinion, always capable of having identified this as a cause of action. As a result, the circumstances would not have been such that I would have accepted that the Plaintiffs were *empêché d’agir*, meaning that the proposed substitution of paragraph 53 would also not have been permitted.
30. In summary, therefore, had I not found that the amendment application process dates from September 2013, the application to amend in relation to paragraphs 53 and 54 of the Amended Cause attached to the Application would have been dismissed for the reason that to have granted leave would defeat plea of prescriptions that would otherwise be available to the opposing Defendants.

Determination of application

31. Having concluded, however, that the Plaintiffs’ application to amend the Cause does not fail by reason of defeating a plea of prescription for the reasons already given, I now need to decide whether to exercise the Court’s discretion to give leave for either or both of paragraphs 53 and 54 in the proposed Amended Cause. In doing so, I have considered whether either

cause of action has no realistic prospect of success and borne in mind that usually amendments will be allowed to enable the issues in dispute between the parties to be adjudicated upon.

32. On the material I have seen, I certainly cannot say that either of the new causes of action has no realistic prospect of success. A number of allegations against all the Defendants have been made associated with the loss to investors such as the Plaintiffs in the Fund operated by the two companies. The new allegations arise out of the overall set of facts already pleaded. In effect, they provide an element of clarity about the allegations being made against the Defendants that was being sought in the correspondence flowing from the letter sent by Advocate Barnes dated 2 September 2013. At face value, they have the same prospect of success as those allegations originally pleaded and whether or not they succeed will depend on the evidence to be adduced at the trial.
33. Bearing in mind that Advocate Barnes was conscious of the impending prescription period when sending his letter seeking the Defendants' agreement to the making the amendments he proposed, otherwise the formal application to the Court enclosed would be progressed, as I have said, I am satisfied that the opposing Defendants were aware within the required timeframe of the fresh allegations. An alternative approach would have been for Advocate Barnes to have settled an entirely new Cause containing just these allegations and caused an appropriate Summons to be served by H.M. Sergeant and made an application for leave to serve outside the jurisdiction in respect of any non-resident Defendant. Had those steps been commenced before the expiry of the relevant prescription periods, the possible prescription defence would not have arisen. In due course, an application pursuant to rule 31 of the 2007 Rules for the two actions to be *crochetées* would inevitably have been made and would most likely have been granted, possibly even by consent. This rather cumbersome way of achieving the same ultimate goal of having all the areas of dispute between the parties resolved without falling foul of any prescription defence would not, in my view, be consistent with the overriding objective. This is a further reason why adopting a pragmatic approach to the raising of the amendment issues is appropriate. Because Advocate Barnes raised the fresh allegations both informally and formally within the required timeframe, I consider that the justice between the parties is for the amendments to be permitted, albeit subject to the usual order that any additional costs occasioned by the amendments to the Cause are to be met by the Plaintiffs.
34. In conclusion, therefore, for the reasons given, the application for leave to amend the Cause to include paragraphs 53 and 54 in the form proposed, subject to tidying up the typographical errors in them (and also across the whole of the proposed Amended Cause) is granted, subject to an order that the Defendants' costs occasioned by the making of all the amendments in the Amended Cause shall be paid by the Plaintiffs.