Zaleski and GM Trustees Limited
Royal Court
9th December, 2014

JUDGMENT
48/2014

The Plaintiff sought leave to amend his Cause pursuant to rule 59 of the Royal Court Civil Rules 2007, and for leave, pursuant to rule 10 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011, to put into evidence a report.

Approved Text
18.12.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **ROMAIN ZALESKI** **Plaintiff**

-and-

GM TRUSTEES LIMITED **Defendant**

Hearing dates: **15th October 2014 (pm only)**
17th October 2014 (pm only)

Judgment handed down: **18th December 2014**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Advocate for the Plaintiff: **Advocate St J A Robilliard**

Advocate for the Defendant: **Advocate N Kapp**

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
Jefcoate v Spread Trustee Company Limited [2013-14] GLR 220
Ogier v Grand Havre Holdings Limited (2000) 29.GLJ.80
Darlington Building Society v O'Rourke James Scourfield & McCarthy (a firm) [1999] PNLR 365
The White Book 2014 (Civil Procedure Rules)
Alpha Developments Limited v Barclays Wealth (Guernsey) Limited (unreported, 19 June 2014)

Introduction

1. By an Application dated 12 September 2014, the Plaintiff seeks leave to amend his Cause pursuant to rule 59 of the Royal Court Civil Rules 2007, and for leave, pursuant to rule 10 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011, to put into evidence the report of Professor Dennis Piotet dated 25 June 2014.

2. The proposed amendment to the Cause relates to para. 11. That paragraph currently reads as follows (as set out in the Cause as re-formed with the consent of the Defendant on 30 May 2014):

> "*At or after the meeting the Defendant purported to put into effect controls so that it could exercise adequate supervision over the Trust assets. The control was that the Protector was to obtain the Trustee's approval prior to making distributions to Beneficiaries. It is averred that despite creating the appearance of trustee control the reality was that the Protector continue[sic] to run the Trust and in that regard:-*
>
> *(1) All of the Beneficiaries' dealings in respect of the Trust were with the Protector and not the Defendant;*
>
> *(2) The Defendant followed without question the distributions dictated by the Protector;*
>
> *(3) The Defendant failed on becoming Trustee or at any time thereafter to make any or any sufficient enquiry of its rights under the Fiduciary Contract. Had it made such inquiries it should:*
>
> *(a) have sought sufficient information so as to exercise the "droit de contrôle" namely all those rights that affect the financial resources of the company;*
>
> *(b) have sought sufficient information so as to be in a position to exercise its rights under the third paragraph of Article 3 of the Fiduciary Contract and verify that the payments of dividends to the beneficiaries was correct;*
>
> *(c) have sought sufficient information to exercise its rights under Article 4 of the Fiduciary Contract; and*
>
> *(d) taken possession of the certificate referred to in Article 5 of the Fiduciary Contract.*
>
> *In the premises the Defendant did not give any instructions to Sacinter regarding the voting rights attached to the PMO shares, the appointment of any director on the board of the directors of PMO or the business of PMO.*"

The amendment the Plaintiff wishes to make is in respect only of sub-para. (a). The Application referred to replacing that sub-paragraph with the following wording:

> "*(a)(i) have sought sufficient information as to the meaning of "les droits patrimoniaux" and "les droits sociaux" in Article 3 thereof;*
>
> *(ii) had it carried out the inquiry under (i) hereof it would have discovered that it had abandoned important rights to Sacinter including the right to vote in PMO's assemblies and the right to appoint directors thereto;*

(iii) *it is averred that the rights referred to in (ii) were valuable rights attached to the assets of the Trust and that the Trustee permitted Sacinter to exercise those rights for no consideration or benefit to the Trust;*

(iv) *as a result of the Trustee's failure to take control of the droits sociaux in PMO Serge Raffet was appointed director by Sacinter to the board of PMO*".

3. During the course of the hearing, it became unclear as to the actual date of appointment of Serge Raffet as director. Once this date was clarified, it meant that the proposal to add para. 11(a)(iv) was based on a flawed factual premise, so Advocate Robilliard, on behalf of the Plaintiff, suggested a revision to the wording to Advocate Kapp, who acts on behalf of the Defendant, so that the wording would be:

> "*(iv)* *as a result of the Trustee's failure to take control of the droits sociaux in PMO Serge Raffet who was appointed by Sacinter to the board of PMO prior to the Defendant's appointment as Trustee was able to continue in office*".

Further, I was informed that Advocate Kapp had agreed on behalf of the Defendant that the Application could be amended so that the wording of the proposed new sub-para. (a)(iv) would be as proposed by Advocate Robilliard. Accordingly, I have considered the Application in the light of that change, noting that the Defendant's opposition to the proposed amendment remains no different substantively.

Background

4. For the purposes of this judgment, it is unnecessary to descend into great detail about the Plaintiff's action against the Defendant. The brief outline that follows suffices.

5. Since November 1999, the Defendant has been the trustee of the PMO Trust, which was settled in 1989. The Plaintiff was added as a beneficiary of that trust in December 1999. Shares in Port Mineralier Owendo (hereafter referred to as "PMO"), a company constituted under the laws of Gabon, were held within the trust. A number of those shares were disposed of on 24 September 2008 by Sacinter SA (hereafter referred to as "Sacinter"), which held them as "*mandataire*" on behalf of the Defendant pursuant to a contract dated 12 September 1995. The Plaintiff claims that this sale was at a considerable undervalue, leading to a loss to the trust fund of nearly €30 million. The Plaintiff alleges that the Defendant acted in breach of duties as trustee that it owed to him as a beneficiary.

6. Because of an exoneration clause in the trust deed, the Plaintiff will have to prove that the Defendant's breach of duty amounted to gross negligence. Particulars of gross negligence are pleaded at para. 42 of the re-formed Cause:

> "*(i)* *failing adequately or at all, to ascertain the value of the PMO shares whilst the Defendant held them as Trustee of the Trust. The Defendant on becoming trustee should have ascertained the value of the PMO shares and should therefore have put in place procedures that it had up to date information as to their value. At a minimum the Defendant was under a duty to prepare trust accounts and on the preparation thereof should have ensured they displayed an accurate and up to date valuation of the PMO shares based on such enquiries as the Defendant ought to have made.*
>
> *(ii)* *failing to appoint any, or any suitable, advisors to provide advice on the value of the PMO shares at any time over the period that it held the shares,*

(iii) failing to implement any, or any adequate safeguards on the Protector or Sacinter so that they could not dispose of the PMO shares without reference to the Defendant and the Plaintiff repeats paragraphs 10, 11, 12, 13 and 14 hereof,

(iv) failing to undertake any, or any adequate, review of the mandate arrangements with Sacinter as contended in paragraph 11(3) hereof, to determine whether such arrangements were appropriate and being complied with,

(v) permitting Sacinter to continue to hold the PMO shares and therefore placing the Protector and Sacinter in a dominant position in respect of the Trust, allowing it to usurp the role of trustee as contended in the paragraphs referred to in (iii) hereof; and

(vi) by failing to:

a. adequately monitor Sacinter;

b. exercise adequate control over Sacinter;

the Defendant placed Sacinter in the position where it considered it could dispose of the PMO shares without reference to the Defendant."

7. The Cause proceeds to allege wilful breach of trust as a further or alternative cause of action. However, because the amendment in respect of which leave is sought affects para. 11(3) of the Cause, to which an express cross-reference is made in para. 42(iv), plus the wider cross-references in para. 42(iii) and also in para. 42(v), I will not comment further on that aspect of the Plaintiff's claim and confine myself to the allegations of gross negligence and the opposition to the proposed amendment advanced by Advocate Kapp on behalf of the Defendant, which falls into two strands. Her primary contention is that the amendment introduces a new cause of action which is now prescribed. Alternatively, she submits that the new case introduced by the amendment has no realistic prospect of success.

The law

8. One aspect of the Application on which the Advocates very broadly agree is the approach this Court should take to it. This arises from the guidance contained in the judgment of the Bailiff in *Jefcoate v Spread Trustee Company Limited* [2013-2014] GLR 220. At para. 52, the Bailiff distilled the principles from the authorities he had reviewed and summarised:

"*... the approach of the Guernsey courts to amendments in the following way:*

(a) The court has a wide discretion under the Royal Court Civil Rules, r.50 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 account of the matters particularized in the Royal Court Civil Rules, r.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 attached 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 of the original pleadings.*
>
> *(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 guidance is, of course, consistent with, and expands upon, the position stated by the Court of Appeal in *Ogier v Grand Havre Holdings Limited* (2000) 29.GLJ.80.

9. In the specific context of whether a new cause of action arises from the proposed amendment, Advocate Kapp has referred to *Darlington Building Society v O'Rourke James Scourfield & McCarthy (a firm)* [1999] PNLR 365. That case involved an action for breach of professional duty, where the defendants applied to strike out the claim and the plaintiffs applied for leave to amend the statement of claim. Delivering the judgment of the English Court of Appeal, Sir Iain Glidewell stated (at pp. 369 and 370):

> "*There are two classic definitions of what constitutes a cause of action. The earlier derived from the judgment of Brett J. in Cooke v. Gill (1873) L.R. 8 C.P. 107 at 116:*
>
> > *"Cause of action has been held from the earliest times to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse."*
>
> *The second comes from the judgment of Diplock L.J. in Letang v. Cooper [1965] 1 Q.B. 232 at 243/4:*

> *"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person … it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person."*

Whereas in this case the claim is based on a breach of duty, whether arising from contract or in tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended pleading with the amendment proposed in order to determine:

(a) whether a different duty is pleaded;
(b) whether the breaches pleaded differ substantially; and where appropriate
(c) the nature and extent of the damage of which complaint is made.

See the judgment of May L.J. in Steamship Mutual Underwriting Association v. Trollope & Colls (City) Ltd (1986) 33 B.L.R. 77 at 97 and 98.

In my view where an amendment pleads a duty which differs from that pleaded in the original statement of claim is will, or certainly will usually, raise a new cause of action. If there is no allegation of a different duty but different facts are alleged to constitute a breach of the duty it is more difficult to decide whether a new cause of action is pleaded."

10. Advocate Robilliard has also referred to the commentary in the *White Book 2014*, which refers to the situation in which an amendment has been permitted, even at a very late stage, because it has arisen from material put forward by the other side (see, eg, para. 17.1.2 and para. 17.3.7). He also drew attention to a more recent decision of this Court on permitting amendments (*Alpha Developments Limited v Barclays Wealth (Guernsey) Limited* (unreported, 19 June 2014)), highlighting a number of paragraphs in the Court's judgment, but especially para. 49:

> "*The principle is that all amendments should be allowed, however late and however much they may be the product of second thoughts (or even discovery of facts arising from the evidence in the case as it progresses) provided this can be done without injustice to the other parties. In my judgment, as indicated above, the basic complaints being made have been sufficiently apparent all along, so that the scope of investigation and evidence preparation by the Defendants has not been, and will not be, significantly or unreasonably extended by permitting the Plaintiffs to advance the arguments and contentions now made expressly in these amendments.*"

Discussion

11. The last point is relevant because Advocate Robilliard went into some detail about the evolution of the case pursued by the Plaintiff and how the position of Mr Raffet has gradually become clearer as material has been disclosed and expert opinion on the effect of the *convention fiduciaire* of 14 May 1997 has assisted. In particular, he referred to a document produced by the Defendant on 9 April 2014, which revealed that Mr Raffet has been the designated representative of Sacinter on PMO and that Sacinter was in possession of considerable information about PMO. Further a witness statement of Steven Ward dated 25 April 2014 was received by the Plaintiff at around that time. As a consequence, the opportunity to re-form the Cause, and thereafter the Defences, was agreed between the parties.

New cause of action?

12. Advocate Robilliard acknowledged that he had failed to understand completely at the time of re-formulating the Cause in May 2014 exactly how to incorporate the allegations that went into para. 11 as set out above. Following receipt of Professor Piotet's expert opinion and the making and answering of a request for further clarification pursuant to rule 60 of the 2007 Rules on 14 and 26 August 2014 respectively, Advocate Robilliard immediately sought the Defendant's consent to further revisions to para. 11(3) of the re-formed Cause. (Indeed, his intention to do so was signalled in the responses to the request for clarification.) The present Application has been made because the Defendant declined to give its consent to the proposed amendment. As set out previously, the amendment initially proposed has had to be modified because the date of Mr Raffet's appointment as a director of PMO has been clarified and pre-dates the appointment of the Defendant as trustee of the PMO Trust. This is perhaps a further example of where there has been relevant information lying in the hands of the Defendant and the Plaintiff is left in the position of having to revise his position as that information is provided to him.

13. From the outset, the Cause has referred to the *convention fiduciaire* (see, eg, para. 8) in a way that means the Court at trial will be required to construe its terms (see, also, para. 15 of the original Defences). The Plaintiff further pleaded that Mr Raffet played a part in the arrangements involving PMO and should have been aware of matters affecting the value of the shares held on trust (eg, para. 12 of original Cause). As the case progressed, it was clear that the Plaintiff was alleging that the Protector and/or Sacinter was always in a dominant position and that the Defendant, which had wished to put controls in place, had ceded too much authority to others.

14. In that regard, the revisions sought to para. 11(3)(a) of the Cause as re-formed arise from a misunderstanding by Advocate Robilliard of his instructions. The division between the "*droits patrimoniaux*" and the "*droits sociaux*" and how the "*droit de contrôle*" fitted in is now clearer. He submits that the changes sought do not allege that there should have been interference in the management of PMO but rather that the Defendant should have taken proper steps to consider fully what powers it was afforded pursuant to the *convention fiduciaire*. What is proposed to be included in para. 11(3)(a) if leave to make the substitution were to be granted, is no more than clarifying the particulars that are currently given in para. 11(a) to (d), all in the context of the opening words of para. 11(3) ("*The Defendant failed on becoming Trustee or at any time thereafter to make any or any sufficient inquiry of its rights under the Fiduciary Contract. Had it made such inquiries it should:*"), which in turn need to be read in the context of the averment in para. 11 that "*despite creating the appearance of trustee control the reality was that the Protector continue [sic] to run the trust and in that regard …*".

15. In response, Advocate Kapp submits that the case the Plaintiff now wishes to advance goes beyond the case that the Defendant has, until now, had to meet on the Cause. There is a new allegation that the Defendant failed to act on the discrepancy now being raised about the terms of the *convention fiduciaire*. In her submission, if the amendment is to be allowed it will introduce an allegation of a specific duty existing to enquire into and interfere in the management of PMO.

16. During the course of the hearing, Advocate Kapp accepted that the substitution of the wording proposed in the Application in respect of para. 11(3)(a)(i) as a direct replacement of the wording in para. 11(3)(a) as currently pleaded could not be objected to. This arises because the case the Defendant accepts it has to meet is that it should have been alert to the meaning of the *convention fiduciaire* and should have exercised its rights under that contract as appropriate. Similarly, there is no real problem with adding the words in proposed para. 11(3)(a)(ii) and (iii). However, there is no allegation as yet that the Defendant acted wrongly in either letting Mr Raffet go on to the board of PMO (or, as it now turns out, permitting him to remain on that board), which is an allegation of a fundamentally different nature, so the

focus has to be on proposed new wording in para. 11(3)(a)(iv), although it cannot be taken in isolation from para. 11(3)(a)(ii) and (iii).

17. The importance of the proposed change is because para. 16 of the Cause as re-formed refers to the Defendant being subject to a number of duties:

> "*(i) to keep the shares under its control;*
>
> *(ii) to obtain sufficient information so that it could properly exercise its functions in respect of the Beneficiaries and the shares;*
>
> *(iii) without prejudice to the generality of (ii) above to carry out the duties set out in paragraph 11(3) hereof*".

If, as Advocate Kapp submits, proposed new para. 11(3)(a)(iv) introduces an allegation amounting to an additional breach of duty, it must be a new cause of action. There is no dispute that if it is a new cause of action it is now prescribed because of the passage of time since the events in question and the presumption, therefore, would be against giving leave for that amendment to be made.

18. Because of the possibility that a defence of prescription will be defeated, the first question is whether or not the proposed amendment, particularly the wording to be included at para. 11(3)(a)(iv) amounts to a new cause of action. I have reached the decision that it does not.

19. I am persuaded that the Plaintiff would, even without the amendment, be in a position to develop an argument that the Defendant had not made any or any sufficient inquiry into its rights under the *convention fiduciaire*. Further, the final words of para. 11 as currently pleaded already assert that "*In the premises the Defendant did not give any instructions to Sacinter regarding the voting rights attached to the PMO shares, the appointment of any director on the board of the directors of PMO or the business of PMO.*" At para. 16.6 of the re-formed Defences, the Defendant has admitted "*that it did not give any instructions to Sacinter regarding the voting rights attached to the PMO shares, the appointment of any director on the board of directors of PMO or the business of PMO. The Defendant denies that it had a duty to or was otherwise for any reason required to make the inquiries referred to …*". The evidential landscape of the case would not, in my view, be all that different, if at all different, even if the proposal to amend had not been made.

20. I am satisfied that the Plaintiff's case against the Defendant has always been premised on an allegation that it failed "*to undertake any, or any adequate, review of the mandate arrangements with Sacinter, to determine whether such arrangements were appropriate and being complied with*" (original para. 25(iv)) and "*to provide to Sacinter any or any adequate directions on the manner in which it was to perform its obligations under the mandate arrangements*" (original para. 25(v)), which have now been converted into the revised particulars of gross negligence in para. 42 of the re-formed Cause, where particular (iv) expressly refers to the review set out more specifically in para. 11(3) and particular (v) refers to "*placing the Protector and Sacinter in a dominant position in respect of the Trust, allowing it to usurp the role of trustee*" as set out in a number of paragraphs, including para.11. Consequently, I reject Advocate Kapp's submission that the case the Defendant has to meet has changed to the extent she suggests. The case now being advanced on behalf of the Plaintiff sets out with more particularity the general complaints that were previously made. This evolution of the case has followed the provision of information to the Plaintiff by the Defendant. The only step in that process which has been unusual is that the Plaintiff had the opportunity to re-form the Cause earlier this year but failed to do so in quite the manner it now seeks leave to amend again. As Advocate Robilliard has indicated, this is really a result of him misunderstanding the instructions he had been given. This is an area where the justice of the situation can be addressed by an appropriate order as to costs.

21. The particulars of gross negligence on which the Plaintiff mounts its claim already encompass the failure "*to implement any, or any adequate safeguards on the Protector or Sacinter so that they could not dispose of the PMO shares without reference to the Defendant and the Plaintiff repeats paragraphs 10, 11, 12, 13 and 14 hereof*". Taking the Cause as a whole, the basic complaint about leaving Mr Raffet in the position he occupied has featured throughout. I treat the proposed amendment as a further means of clarifying the route the Plaintiff now takes in relation to that basic complaint, which follows in the light of the material disclosed and his understanding of it. It is an example of the allegation made of failing to enquire adequately about the rights available under the *convention fiduciaire* and the assertion as to what could have been done better to safeguard the position had a fuller appreciation of those rights been obtained. It does not, in my view, constitute a new cause of action.

Prospects of success

22. Having concluded that that this is not a new cause of action because the amendment arises out of facts already pleaded (or substantially the same facts as already pleaded), I need to consider the alternative basis on which Advocate Kapp has opposed the Application, namely whether the case introduced by it has no realistic prospect of success. In that regard, the Defendant relies on clause 8 of the trust deed (a type of "anti-*Bartlett*" clause) in respect of the PMO Trust:

> "*The Trustee shall not be bound or required to interfere in the management or conduct of any business in which the Trustee holds shares, whatever the proportion of the issued share capital it holds. Unless the Trustee has actual knowledge of any act of dishonesty on the part of the directors managing such a company, the Trustee shall be at liberty to leave the conduct of the Company's business (including the decision whether or not to pay dividends wholly to the directors).*"

23. There appears to be a dispute between the parties as to quite how the provisions in the trust deed inter-relate. Contrary to Advocate Kapp's submissions, Advocate Robilliard suggested it would be necessary to concentrate on the custody arrangements in respect of the shares in PMO which permitted Mr Raffet to decide to sell the shares at a particular time, in respect of which clause 8 has no relevance.

24. In the light of those different approaches, I cannot conclude that there is no realistic prospect of success. Now that the position of Mr Raffet is put more particularly as it is set out in the proposed amendment and more specific details of how to construe the *convention fiduciaire* have also been incorporated into the Cause, I am left with the impression that the success or otherwise of this aspect of the case against the Defendant will turn in part on the evidence given and in part on the application of those facts to the terms of the *convention fiduciaire*. Accordingly, it would be premature and speculative to reach any firm conclusions on these issues. The test of establishing no realistic prospect of success places a heavy burden on the Defendant and I am satisfied that it has not discharged it here.

25. Overall, therefore, I am satisfied that the Plaintiff's re-working of clause 11(3)(a) in the Cause should be permitted because the justice of the case, taking into account how the Defendant can be compensated by an order for costs, lies in favour of allowing the dispute between the parties to be adjudicated upon. It is unfortunate that this Application has been necessary because of the confusion about which parts of the *convention fiduciaire* should be referred to in para. 11 of the re-formed Cause. However, I consider that it is better to have resolved that confusion now rather than leaving it to later on, whether in the run-up to, or even at, the trial.

Expert evidence

26. Advocate Kapp indicated that if the Application to amend the Cause were to be granted, the Defendant's objection to the admission of expert evidence on the meaning of the *convention*

fiduciaire fell away. In those circumstances, I will give leave to the Plaintiff pursuant to the 2011 Rules to put into evidence the report of Professor Piotet dated 25 June 2014.

27. As discussed at the hearing, an alternative way of proceeding would be to extract from that report those elements of evidence as to the approach of Swiss law to the *convention fiduciaire* that both Advocates agree need to be put before the Court and incorporate them into an agreed statement. I would be content with either approach.

Conclusion

28. For the reasons given, the Application is granted, albeit on the unusual terms that the Plaintiff will pay to the Defendant the reasonable costs of and caused by the Application to amend the Cause. I have reached that decision because the Application to amend arose from Advocate Robilliard failing to understand completely the instructions he had received prior to the previous agreed amendment of the Cause. The costs resulting from the application regarding expert evidence will be costs in the cause. If the Defendant needs to amend its Defences as a result of the amendment to the Cause, it can do so.