10 pages.

ROYAL COURT

15

24th January, 1990

Before: J.M. Chadwick, Esq., Q.C., (President)
R.D. Harman, Esq., Q.C.,
A.C. Hamilton, Esq., Q.C.

Between: **Mocha Investments, Limited** Appellants

And: **Robert George Day, Richard John Michel, Geoffrey George Crill, and Peter Roy Cushen, exercising the professions of advocate and solicitor under the name of Crills** Respondents

---

Application for leave to appeal against Order of the Royal Court (Samedi Division) of 17th February, 1989, whereby the respondents were discharged from the action, on the grounds that the action was, inter alia, "informe".

Advocate P.C. Sinel for the appellants,
Advocate T.J. Le Cocq for the respondents.

JUDGMENT

THE PRESIDENT: We have before us an appeal by Mocha Investments Limited, who was plaintiff below, against an Order of the Royal Court made on the 17th February, 1989, in the action Mocha Investments Limited -v- R.G. Day and others, practising as Crills.

A preliminary point was raised as to whether the Notice of Appeal was properly served in the circumstances that the appeal could be said to be in an interlocutory matter; and thus covered by Article 13(e)of the Court of Appeal (Jersey) Law. We had not thought it necessary to decide whether the matter is or is not interlocutory. We took the view that the most convenient course was to hear the appeal, on the basis that if leave were needed we would give it.

By the Order appealed against the Court struck out a summons which had been issued by the plaintiff, Mocha Investments Limited. That summons is dated 10th February, 1989, and is addressed to Messrs. Crills; it reads:

> "You are required to appear at the Royal Court in the Island of Jersey, on Friday, 17th February, at 2 o'clock in the afternoon to defend the action, particulars of which appear below. If you do not appear judgment may be given in your absence".

Then appear the names of the defendants and the plaintiff. The summons goes on:

> "Actioning the defendants to pay the sum of £2,000 in respect of a breach of trust plus interest, plus costs".

The summons is signed by the plaintiff's advocate and it is endorsed at the foot with the note:

> "If you do not dispute the amount claimed in this summons and wish to settle without appearing in Court, please remit the full amount claimed plus costs to date of £25".

And there is then a direction as to how cheques should be paid.

The Order appealed against is embodied in an Act of the Royal Court. In the form in which it was originally drawn up that Act of Court recited the parties and went on: "The defendants having appeared and having submitted that the action was wrongly instituted by simple action, the Court upon hearing the plaintiff's advocate upheld the defendants' submission and discharged them from the action in its present form with costs".

That Act of Court was subsequently amended. The record in the amended version is really the only written material which records what happened before the Royal Court on the 17th February, 1989. The amended version is dated 15th January, 1990, and I read from it:

> "1. That on a date in or about the first two weeks of February, 1989, the defendants were served with a document purporting to be a summons. That document was tabled and called before the Court on the 17th February, 1989.
>
> 2. That on the 17th February, 1989, the defendants appeared through Counsel and submitted, inter alia, that the document was "informe" and in purporting to be an action for commencement of breach of trust could not be commenced by simple summons and required fullness of pleadings. That, in addition, the defendants identified other faults in the said document".

The Act of Court then recites that, after hearing counsel for Mocha Investments Limited the learned Bailiff discharged the defendants from the action as then constituted; and that subsequent to the said discharge, the Act of Court dated 17th February, 1989, was issued over the signature of the Judicial Greffier. Paragraph 5 of the amended Act dated the 15th January, 1990 reads:

> "That the defendants believe the said Act of Court does not fully and accurately reflect the submissions of the defendants' Counsel made on the 17th February, 1989, and in consequence does not accurately reflect the reasons for the decision of the Court. That in particular, whilst acknowledging that the defendants made a submission that the

document served on them was wholly "informe", the Act did not reflect:

(i) that the defendants submitted that they had suffered a prejudice in that an allegation for breach of trust was not specifically pleaded in detail;

(ii) that they had suffered a prejudice in first appearing before the Court not knowing the precise nature of the allegations against them and in consequence being unable to plead thereto had they so wished;

(iii) that because the proceedings have been issued in the form of a purported summons, the Court could not consider its jurisdiction under Article 47(3) of the Trusts (Jersey) Law, 1984;

That further although not specifically addressed on the point the Court read the document and in consequence knew that it purported to convene the defendants for 2.00 p.m., at a time when the Court does not sit".

The Act of Court then recites the fact that the plaintiff has appealed. It records the contention that the decision was not a final decision and the plaintiff needs leave. It goes on to record the defendant's prayer that the Act of Court of the 17th February should be amended and altered to reflect the facts set out above.

The amended Act then continues:

"Upon reading the said representation and upon hearing the parties, through the intermediary of their advocates, the Court -

(1) ordered that the said Act of Court of the 17th February, 1989, be amended by substituting for the final paragraph thereof the following paragraph:

> "The defendants having appeared and having submitted that the action was inter alia "informe" the Court, upon hearing the Plaintiff's Advocate, upheld the defendant's submission and discharged (renvoyé) them from the action in its present form, with costs"."

The significance of that amendment can be understood when one looks at the provisions of Rules 7/6 and 7/7 in the Royal Court Rules of 1982. Rule 7/6 is in these terms, under the cross-heading: "Non-compliance with Rules of Court or Rules of Practice":

> "Subject to Rule 7/7 non-compliance with any rules of Court or with any rule of practice for the time being in force shall not render any proceedings void unless the Court so directs. But the proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and on such terms as the Court thinks fit".

Then Rule 7/7, under the cross-heading: "Non-compliance as to mode of beginning of proceedings" reads:

> "1) No proceedings shall be void or be rendered void or wholly set aside under Rule 7/6 or otherwise by reason only of the fact that the proceedings were begun by a means other than that required in the case of the proceedings in question".

The effect of those Rules is that if the only ground of complaint were that the proceedings were wrongly instituted by simple action then Rule 7/7 would preclude the Court from exercising a jurisdiction under Rule 7/6; but if the defect complained of goes wider than that the summons was a wrong method of commencing proceedings - so that the summons can be regarded as irregular for some other reason - then Rule 7/7 does not preclude the exercise of the discretion under Rule 7/6.

In the circumstances that the amendment to the Act of Court was made, I find it impossible to avoid the conclusion that the Bailiff must have been satisfied that on 17th February, 1989, he has, and was exercising a discretion under Rule 7/6 in circumstances where he was satisfied that there was some irregularity other than merely the commencement of the proceedings by a wrong process. If that were not so the amendment which has been made on 15th January, 1990, would be pointless.

The question arises therefore: was the summons irregular? There is no record of the Bailiff's decision, but one can see from the amending Act of Court that the points taken before him included the complaint that the allegation for breach of trust was not specifically pleaded in detail and that the defendants had suffered a prejudice by not knowing the precise nature of the allegations against them.

The Rules of Court provide that an application may be started by a simple summons in cases, amongst others, where the claim is for a debt or liquidated demand. In this case the claim in the summons is for a liquidated sum of £2,000 in respect of a breach of trust. In my view a claim in respect of a breach of trust is necessarily a claim for damages. We have been referred to authority for the proposition that a claim for damages is not converted into a debt or liquidated demand merely by the specification of the amount of the damages claimed. I read, for convenience, the note to that effect which is to be found in the English Supreme Court Practice, 1988, at p.35 under note 6/2/4. "The words "debt" or "liquidated demand" do not extend to unliqudated damages whether in tort or in contract even though the amount of such damages be named at a definite figure". The case cited in support of that proposition, and to which we have been referred is Knight -v- Abbot, Page and Company (1882-1883) 10 QBD 11.

On that ground therefore the summons issued by this plaintiff was irregular in the sense that the proceedings were commenced by the wrong process. But that, for the reasons that I have given, would not be sufficient to enable the Court to strike that summons out under Rule 7/6.

There is, however, another basis upon which the summons is open to objection. It is this. The requirement under the Rules is that the summons shall be in the appropriate form set out in the second schedule. When one goes to the relevant form in the second schedule to the Rules it is clear that particulars of the claim must be set out in the summons. This summons follows the form in the schedule, to the extent that it refers to particulars set out below and it then describes the action, as I have said, as an action for the sum of £2,000 in respect of breach of trust. I do not think that that is a sufficient compliance with the Rules.

In my view it is essential, if a summons of this nature is going to be used, that it makes clear to the defendants what the claim is that is made against them so that they can consider whether to pay it without incurring further expense. That is emphasised by the endorsement at the foot of the summons itself. It seems to me that it would be extremely difficult, if not impossible, for a defendant - or at least for a defendant who was or could be said to be a trustee - to know with any degree of certainty whether he disputed the amount claimed if all that was claimed against him was a sum of £2,000 in respect of a breach of trust. Some particulars must be given which enables the defendant to know what claim it is from which he will be discharged if he makes the payment that is sought. That deficiency would, of course, in the ordinary way be cured if there were pleadings, or an Order of Court because the facts would be set out with sufficient particularity to know what it was that was being asserted. But, at the very least, the summons ought to specify with sufficient particularity the facts relied upon to enable the defendants to know what claim it was that they are being asked to pay.

In those circumstances it seems to me that the Bailiff was entitled to take the view that the proceedings before him were irregular. He therefore had a choice between ordering that they be set aside wholly or in part, or amended, or otherwise dealt with in such manner and on such terms as the Court thought fit. In the ordinary way this would not be a suitable case for directing an amendment. The summons had been, as it were, stifled at birth. No proceedings had taken place on it. The correct form of process was an Order of Justice; and there was no good reason for amending an inappropriate process rather than starting again with an appropriate one.

The Bailiff, however, took into account the possibility that to direct that the summons be struck out might prejudice the plaintiff if a period of limitation had expired in the interim, so that the action could not be brought by a new Order of Justice. If he had been told that that was the case, he might perhaps have considered exercising his discretion in a different way. But he was not told that; he was told by the advocate for the defendants that they could not see any point to be taken in reliance on prescription by way of defence to a claim in respect of the breach of trust which they understood to be alleged. That, no doubt, was realistic if the circumstances were, as we have been told, that they still had the money in respect of which they are

said to be trustees.

The advocate who appeared for the plaintiff below - who was not Mr. Sinel - confirmed to the Bailiff that as far as he was aware there was no relevant period of limitation. In those circumstances it seems to me that the Bailiff was fully justified in taking the view that the more convenient course was to require the proceedings to be started in the proper way by Order of Justice, rather than direct an amendment of the summons.

We have been told by Mr. Sinel - who has appeared for the appellant before us - that there may, after all, be problems arising out of the expiry of a period of prescription. Those problems have not been identified with any great particularity, but they appear to me to arise in the circumstances that the plaintiffs may wish to frame their action in the form of a claim for breach of contract or in negligence. If that is so, then it seems to me that they would be in great difficulty in seeking, after the expiration of a relevant limitation period, to tack on a claim of that nature to the claim which they have asserted in respect of breach of trust; and it would be wrong to exercise a discretion on the basis that they were going to be entitled to do so. It has been made clear by Messrs. Crills that if an Order of Justice is now served they will not take a point that a claim made in that Order of Justice in respect of the sum of £2,000 in respect of a breach of trust is statute barred. That appears to me to protect the plaintiff's position to the greatest extent to which they are entitled.

In those circumstances I would give leave to appeal and dismiss the appeal.

HARMAN, J.A: I agree.

HAMILTON, J.A: I agree.

Authorities

Royal Court Rules, 1982: 5/16; 3/4; 7/6; 7/7.

Rules of the Supreme Court (1988 Ed'n) 0.3 r. 5 - r. 5/4; 0.6/2/4; 18/12; 59/1/25; 59/14/7.

Craig -v- Kanseen (1943) 1 All E.R. 108.

Kofi Forfic -v- Seifah (1958) A.C. 59.

Petty -v- Daniel (1886) 34 Ch. D. 172.

Macfoy -v- United Africa Company Limited (1961) 3 All E.R. 1169.

Hamp-Adams -v- Hall (1911) 2 K.B. 942 at 1944.

Anlaby -v- Praetorius (1888) 20 Q.B. 764 at 770.

Halsbury's Laws of England (3rd Ed'n) Vol. 30, paras 748, 749.

Knight -v- Abbott, Page and Company (1882-1883) 10 Q.B.D. 11.

Trusts (Jersey) Law, 1984, Article 47(3).

Dictionnaire Juridique: p.152.

Le Gros: Droit Coutumier de Jersey", p.431.

Pothier: "Procédure Civile et Criminelle", Tome 14, p.p.17, 18.

Cutner -v- Green (1980) J.J. 209 at 276.

Rahman -v- Chase Bank (C.I.) Trust Company Limited and Others (1984) J.J. 129 at 133 et seq.

Wentzinger -v- Castel Esnol (1891) Exs 192.

Court of Appeal (Jersey) Law, 1961.

White -v- Brunton (1984) 2 All E.R. 606.