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IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 3 OF 1983

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE GEORGES, J.A.
THE HONOURABLE MR. JUSTICE HENRY J.A.

R.ALBERGA Q.C., ANGUS FOSTER WITH HIM FOR THE APPELLANTS INSTRUCTED BY W.S. WALKER & COMPANY

P.LAMONTAGNE Q.C., ROGER NELSON WITH HIM FOR THE RESPONDENTS INSTRUCTED BY TRUMAN BODDEN & COMPANY

REASONS FOR JUDGMENT

This is an appeal from an order of Schofield J. dated 3rd October, 1990 in which he granted leave to Mrs. Valentina Iorgulescu (the respondent) to re-amend her statement of claim in her action against the Swiss Bank and Trust Corporation Ltd. (the Bank). At the time of making the order the learned judge granted the Bank leave to appeal.

The action had taken some time to reach the stage where it could be set down for hearing on 1st October, 1990. The writ of summons had been filed on 7th January, 1983 and appearance entered on 21st January, 1983. The statement of claim was not filed until 23rd May, 1984.

In essence it alleged that in or about early 1977 the respondent had transferred her investment portfolio worth approximately US$1,500,000.00 to an account with the Bank. She had had prior consultation with officers of the Bank and had expressed her wish to convert her portfolio into Swiss Franc investments as she was concerned that the United States dollar, in which currency the bulk of her holdings were denominated, was likely to fall in value.

After some discussions and the rejection of advice coming from the New York affiliate of the group to which the Bank belonged, the respondent agreed to a recommendation that she should invest in Universal Bond Selection (U.B.S.) units at a price of SF87 per unit of investment. The statement of claim alleged that she thought the holdings of U.B.S. consisted principally of investments denominated in Swiss Francs. In fact only 20% of its holdings were in investments so denominated. It was also alleged that two dividends accruing from her investment were re-invested in further U.B.S. units without her written authority.

In late 1977 or early 1978 she discovered that the price of U.B.S. units had fallen. She repeatedly asked that her holding be converted into French gold-indexed bonds. An official of the Bank informed her that such bonds did not exist and that the U.B.S. units could not be converted and had to be held for the duration of her life. Eventually at her insistence the bonds were sold and realised in Swiss Francs, a sum considerably less than what she had paid for them. The cause of action was summarised in paragraph 20 of the Statement of Claim as breach of agreements made between herself and the Bank and breach of their duty of care to her as her investment adviser.

The Bank delivered its Defence on 7th January, 1985. It denied that it had ever acted as the respondent's investment adviser. The relationship had been that of banker-custodian and customer. It pleaded the agreements signed by her - a custodian agreement and a liability agreement. It averred that the respondent had been fully aware of how the U.B.S. units were constituted and had received and perused all the literature concerning the units which were on display in the Bank's lobby.

On 9th December, 1985 the respondent filed an amended statement of claim. The significant change was that the cause of action was no longer based on breach of agreement and of duty of care as heretofore. It was based in the amended paragraph 20 on -

> "breach of the aforesaid Agreements and/or its fiduciary duty and/or in breach of Trust to the Plaintiff as her investment adviser and/or banker and/or trustee and/or agent".

The amended Statement of Claim contained a new paragraph - paragraph 22 which averred -

> "Further in dealing with the said investments, the Defendant acted in such a way as to secure maximum profit for itself, its parent or affiliated companies; more particularly, charged a commission for the sale of the Plaintiff's portfolio, another commission for the conversion of the Plaintiff's U.S. currency into Swiss Francs and further commission for the purchase of the U.B.S. units".

Among the claims made was one for an account of the commissions and other revenues received by the Bank handling the Respondent's portfolio.

An amended defence was delivered 30th January, 1986. There was a denial that the relationship between the Respondent and the Bank was anything other than the relationship of banker and customer. The Bank had never been the Respondent's investment adviser, trustee or agent. Dealing with the averments in paragraph 22 of the amended Statement of Claim paragraph 19 of the Defence stated in part -

> "(1) The Defendant charged its customary transaction fee of 0.25% in relation to the sale of the Plaintiff's bank portfolio. Such charge totalled US$3,553.80.
>
> (2) The Defendant did not charge a commission on the conversion of the Plaintiff's US dollars to Swiss Francs,

(3) The Defendant charged no commission to the Plaintiff when on the Plaintiff's instructions it purchased the Universal Bond Selection Units for her at the quoted price on the day of purchase. The Defendant did, however, receive a return commission from the Fund in accordance with the usual practice".

In compliance with a request for particulars the Bank explained what was "the usual practice." All fund managers included in their quoted price a factor in respect of issuing commission. When a purchaser purchased through a third party all or part of that commission was paid to that third party and was called a "return commission". The commission varied but was usually in the region of 5%. In this case the Bank had received 2% or SF66,825.

A re-amended Statement of Claim was delivered on 4th September, 1986. The amendments dealt principally with the quantification of the damages. The nature of the claim remained unaltered. A re-amended Defence was delivered on 29th September, 1986.

The Respondent filed a Reply dated 4th February, 1986 in which there was specific response to paragraph 19 of the re-amended Defence. The Reply stated that no admissions were being made as regard sub-paragraph 1-5. Mr. Alberga contends, and this seems indisputable, that the issue of commissions received by the Bank as set out in paragraph 19 and elaborated in the Particulars was being specifically addressed.

Subsequently on 23rd January, 1990 the Bank served on the Respondent the report of its expert which alluded to the question of the return commission. The expert confirmed that it was "the usual practice". In his experience it could be as high as 8.5%.

By notice dated 2nd May, 1990 the matter was set down for hearing on 1st October, 1990.

On 24th September, 1990 Mr. Lamontagne acting on behalf of the Respondent approached the Bank's counsel, Mr. Alberga, to discuss an amendment to the Statement of Claim which he wished to make. Paragraph 22 was to be amended by an averment that the Bank had received the commission for the purchase of the U.B.S. units -

"without disclosing such receipt to the Plaintiff".

Essentially this was a completely fresh cause of action seeking the return of a commission alleged to have been secretly received. The letter dated 25th September, 1990 from Truman Bodden and Company to W. S. Walker and Company obliquely concedes this when it states in paragraph 3 -

> "As for the secret commission claim, this was set up somewhat in paragraph 22 of the Re-amended Statement of Claim. However, it was not made clear that commissions were received from Swiss Bank Corporation or Interfonds without our client's knowledge".

Messrs. W. S. Walker & Company in their reply to that letter dated 26th September, 1990 confirmed that there was strong objection to the amendment as Mr. Alberga had made clear to Mr. Lamontagne. They stated -

> "We do not agree that the claim which you now seek to make by your proposed amendments to paragraph 22 in relation to the secret commission was `set up somewhat in paragraph 22 of the Re-Amended Statement of Claim' as you suggest. This is an entirely new claim suggested for the first time by Mr. Lamontagne in his discussion with Mr. Ramon Alberga on 24th September and now purportedly put in writing by your proposed amendment. We consider it grossly prejudicial to our client that this new claim should be intimated at this very late

> stage, only one week before the trial. The details of the commission have been known to your client and her legal advisers for several years and indeed were specifically pleaded to by our client in its Amended Defence dated 30th January, 1986, with particulars thereof being given in the Further and Better Particulars of the Amended Defence served on 25th March, 1986. This proposed claim raises for the first time the issue as to whether our client knew or ought to have known of the return commission received by our client from the Fund when the purchase of the Universal Bond Selection Units was made in August, 1977 or thereafter; matters which occurred as much as 13 years ago. This is clearly prejudicial to our client for whom it is obviously impossible at this stage to investigate matters that occurred so long ago".

An application for the amendment was made on the opening day of the trial before Schofield J. Mr. Alberga elaborated on the argument summarised in his letter of 26th September, 1990 the core of which has been cited above. Schofield J. granted the amendment as prayed - hence this appeal.

There has been no serious dispute as to the principles which should govern the grant or refusal of an amendment. The dictum of Brett M. R. in Clarapede & Co v. Commercial Union Association (1988) 32 W. R. 262 at page 263 as cited in Ketterman v. Hansel Properties Ltd. [1988] 1 ALL E. R. 38 by Lord Griffiths at pages 61-2 remains authoritative -

> "The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs".

The aim is to have all disputes between the litigating parties settled on their merits in one trial.

While Lord Griffiths did go on to propose a more robust approach and emphasised the difference between amendments which

merely clarified issues and those which raised entirely new claims or entirely new defences, he did return to the concept on which Brett M. R. based his approach stating at page 82 -

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by the assessment of where justice lies".

There is also no serious dispute as to the principles on which an appellate tribunal should act when asked to reverse a discretion so exercised by a trial judge in a matter such as this. They are summarised in the Supreme Court Practice 1991 at page 59/1/33 -

> There are many authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the Judge to make unless it is shown that he exercised his discretion under a mistake of law.....or in disregard of principle....or under a misapprehension of the facts....or that he took into account irrelevant matters....or failed to exercise his discretion....or that his order would result in injustice...., and the Court will assume that the Judge properly exercised his discretion unless the contrary is shown....".

The brunt of the attack on appeal has concentrated on this statement by the trial judge -

> "Of course plaintiff's counsel has indicated that he is facing the task of proving her lack of knowledge without the Court hearing from the plaintiff herself; but that would be a matter for evidence at the trial and it is inappropriate for me to comment or pay regard to his chances of success at the trial. This is, of course, unless I am satisfied that this is a useless claim, which I am not".

Mr. Alberga contends that in the circumstances of this case the amendments plainly raised a useless claim, one which could not get off the ground and the trial judge was clearly wrong in holding otherwise. He submitted that the history of the matter demonstrated that it was a last minute afterthought when much of the case originally pleaded by the plaintiff had crumbled and that the plaintiff's lack of knowledge, essential for the

establishment of the new cause of action, could not be proved without the plaintiff's evidence. Mr. Lamontagne had frankly stated that the plaintiff could not be called as a witness. Her mental condition was such that she could not give evidence. She did enjoy periods of lucidity but such periods were not extended. The indications were that Mr. Lamontagne would have to depend on the evidence of former officials of the Bank to prove his case and he had no proof of the evidence of any of these witnesses. The trial judge had not elaborated the basis for his conclusion that the amendment had not raised a useless claim and it was obviously wrong.

Lawrance v. Lord Noreys (1887) 39 Ch. D. 213 does establish that an amendment will be refused and a statement of claim will be struck out if the cause of action which they seek to raise is vexatious and an abuse of the process of the court. Bowen L.J. at page 234 emphasises that it is a power which should be exercised with care -

> "I quite agree that this power should be exercised with the very greatest care, that it is not for the Court on a motion of this kind to discuss the probabilities of the case which is going to be made, except so far as to see whether the case stands outside the region of probability altogether and becomes vexatious because it is impossible. In the present case it seems to me that the history of the allegations points unmistakably in one direction".

This was also the attitude taken by Lord Herschell on appeal - Dow Hager Lawrance v. Lord Noreys and others (1890) 15 App. Cases 210 at page 219 -

> "It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground".

In Lawrance v. Noreys (Supra) the proceedings were in the form

of an application to have the statement of claim struck out and not that of an application to amend but the principles applicable would be the same in either case as was pointed out by Collins L. J. in the report in 39 Ch. D. at page 232 -

> "The Court of Queen's Bench did not allow the proposed amendments to be made, and dismissed the action on the ground that the unamended statement of claim showed no good cause of action. It is true that the order made by them dismissing the action on the ground that the statement of claim was not sufficient, is no judgement as regards what we have now before us, but I cannot disassociate myself from that order the refusal of leave to amend. If the Judges had thought that there was reasonable ground for making these proposed amendments, they would not have cut the case short by dismissing the action on the ground that the unamended statement of claim did not show a good cause of action, but leave to amend would have been given on proper terms".

Lawrance v. Noreys (supra) was a case of an attempt to found a claim on a concealed fraud perpetrated some 70 years before the date of the filing of the action. The onus on a plaintiff seeking to establish fraud is a heavy one - higher than that of the balance of probability. Where it was obvious from the history of the matter and the nature of the pleadings that it was impossible that the plaintiff could prove such a case, the case was sufficiently exceptional to invoke a jurisdiction which is only sparingly exercised.

While the trial judge did not set out his reasons his conclusion was that this was not such a case. Proof of lack of knowledge on the plaintiff's part could not be dismissed as impossible. Once this was so the amendment could not be described as useless. It cannot be said that he was wrong in so concluding.

Failure to identify the cause of action earlier despite the pleadings of facts which should have prompted its

identification could be the result of oversight as Mr. Lamontagne explained. The means by which the instructions were obtained from the plaintiff during her brief periods of lucidity and passed on to Mr. Lamontagne have also been recounted. An application for an amendment is not required to be supported by affidavit. The court can listen to the history of the matter as given by counsel and act on that, though it may ask that certain matters be put before it by means of affidavit. The absence of any affidavits is thus not significant.

It is not in dispute that amendments should not be easily granted which raise new causes of action which may be statute barred. This does not loom large in this case. The law in Caymans has not been definitively settled but it has been decided in Guiness Mahon Cayman Trust Limited v. Washington International Bank and Trust Limited [1987] C.I.L.R. page 447 that English law applies so that where an amendment raises a new cause of action based on the same or substantially similar facts to those already pleaded it may be granted even if the period of limitation has expired.

The trial judge carefully weighed the issue of prejudice. One of the strongest was that the Bank would not be able to recover the costs of bringing to the Caymans two former employees of the Bank who no longer live in the Caymans. This follows from the decision of Collett C. J. in Indersoll-Rand v. Banco Portuguese do Atlantico C.C. 271 of 1985. That circumstance should not be allowed to weigh too heavily. If it did, the result would be that amendments would always be more difficult in cases in which the amendment made it necessary for an overseas witness to return a second time. In any event leave can always be granted on condition. The respondent can be ordered to pay the Bank the expenses incurred in bringing the

witness to the Caymans for the aborted trial.

Much has been said on the difficulties of proof after the lapse of many years. One witness Mr. Horner, has died but two are available and there seems to be no issue as to their state of health and their unavailability for that reason. Since the transactions took place in 1978-79 it seems unlikely that recollections would have been that much better in 1986, when this amendment could have been sought and would have been granted without serious contest, than they would be in 1990.

Accordingly it was concluded that the appeal should be dismissed but that the order of the trial judge be varied by making it a condition of the granting of leave that the respondent /plaintiff pay to the Swiss Bank the expenses of bringing to the Caymans for the aborted trial its witnesses from overseas. In the event that there is no agreement as to the amount the Registrar will assess the expenses incurred.

The appellant was ordered to pay to the respondent the costs of the appeal to be taxed if not agreed.