1984 December 20

[SAVVIDES, J.]

WILLIAMS AND GLYNS BANK LIMITED,

Plaintiffs.

v.

THE SHIP "MARIA",

Defendant.

and

BY AMENDMENT PURSUANT
TO AN ORDER OF THE COURT GIVEN ON 26.1.1983

WILLIAMS & GLYNS BANK PLC,

Plaintiffs.

v.

THE SHIP "MARIA",

Defendant.

(*Admiralty Action No.* 59/82).

Practice—Pleadings—Foreign Law—Relied upon and pleaded as a ground of defence—Particulars can be given in the pleadings of the case-law and of opinions of text book writers—Inclusion of such matters in the pleadings cannot be treated as frivolous, vexatious, irrelevant, embarrassing, or in abuse of the process of the Court—Burden on applicant to satisfy the Court that such matters frivolous etc. and he failed to discharge such burden.

Practice—Pleadings—Striking out—Principles applicable—Mere fact that an allegation is unnecessary not a ground for striking out —A pleading is not embarrassing merely because it is probable that certain allegations may ultimately turn out to be untrue—And the same applies to points of law—Inherent jurisdiction of the Court, which exists apart from the Rules, to strike out matters which are frivolous or vexatious or in abuse of its process to be very sparingly exercised and only in very exceptional circum-

stances—Delay—Applications for striking out should be made promptly—And they may be refused if made after the action is set down for trial

Following the close of the pleadings early in 1983 the action was set down for hearing in May 1983 and was subsequently adjourned to the 31st October 1983 when a witness for the plaintiffs was heard Due to a number of interlocutory applications filed by such date the continuation of the hearing was adjourned, so that the Court, in the meantime, would have dealt and disposed of such applications In November, 1983 the defendants applied for the striking out of certain parts of paragraphs 10, 12 and 16 of the reply and answer of the respondents-plaintiffs to the defendant's counterclaim The parts sought to be struck out were certain particulars of Greek Law mentioned in the said paragraphs consisting of reference to decisions of the Greek Courts and opinions of text book writers

On the question whether when foreign law is relied upon and pleaded as a ground of claim or defence particulars can be given in the pleadings of the case–law and of opinions of text book writers and whether the inclusion of such matters in the pleadings can be treated as frivolous, vexatious irrelevant, embarrassing, or in abuse of the process of the Court·

Held, (1) that the mere fact that an allegation is unnecessary is not a ground for striking out; that a pleading is not embarrassing merely because it is probable that the allegations made may ultimately turn out, to be untrue in fact, that the same applies to cases where points of law are stated or alleged which may turn out to be bad; that though apart from the provision in the Rules empowering the Court to strike out pleadings, there is inherent jurisdiction to the Court, under the Common Law, to strike out from the pleading any matters which are frivolous or vexatious or in abuse of its process such jurisdiction ought to be very sparingly exercised, and only in very exceptional circumstances.

(2) That once the respondents, by their defence to the counterclaim seek to rely on foreign law, they should be given full particulars of the "*precise statute, code*, rule, regulation, ordinance, or *case law* relied on"; that omission to plead them might prejudice them at the hearing as they might be impeded to introduce

such matters when their expert witness will be giving evidence if an objection is made that they were not pleaded; and that, therefore, the contention, of counsel for the applicant that such particulars have wrongly been inserted in the pleadings cannot be accepted.

(3) That the burden was upon the applicant to satisfy the Court that his allegations to the effect that the matters sought to be struck out were irrelevant, frivolous, vexatious, embarrassing or in abuse of the process of the Court; and that the applicant failed to discharge such burden

Held, further, that although an application for striking out may be made at any stage of the proceedings it should always be made promptly; and that it is only in exceptional circumstances that it may be made after the close of pleadings but in any event the Court may refuse to hear such an application after the action is set down for trial; that allowing applications of this kind after such long delay and after the action is set down for hearing, or the hearing has commenced would amount to availing a party wishing to postpone the hearing, the opportunity of achieving his target by taking steps to have any avermen in the pleadings struck out; and that, accordingly, the application must be dismissed.

Application dismissed

Cases referred to:

Rock v. *Pursell* [1887] 84 L.J. 45;

Child v. *Stenning* [1887] 5 Ch. D. 695;

Turquand and Others v. *Fearon* [1879] 15 L.T. 543 at p. 544

Tomkinson v. *South Eastern Railway Co.* (No. 2) [1887] 57 L.T 358 at p. 360;

Laurence Scott & Electromotors Ltd. and Others v. *General Electric Co. Ltd.* [1983] 55 R.P.C. 233.

Metropolitan Bank v. *Pooley* [1885] 10 App. Cas. 210 at pp 220, 221;

Lawrence v. *Lord Norreys* [1890] 15 App. Cas. 210 at p. 217

Attorney-General of the Duchy of Lancaster v. *London and North Western Railway Co.* [1892] 3 Ch. 274;

Cross v. *Earl Howe* [1892] 62 L.J. (N.S.) Ch. 342.

Application.

Application by defendant for an order striking out paras. 10, 12 and 16 of the reply and answer of the plaintiffs to defendants counterclaim.

M. Eliades with *A. Skordis*, for the applicant.

E. Montanios with *P. Panayi* (*Miss*), for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following decision. This is an application by the defendant ship for striking out certain parts of paragraphs 10, 12 and 16 of the reply and answer of the respondents-plaintiffs to the defendant's counterclaim. The parts sought to be struck out are certain particulars of Greek Law mentioned in the said paragraphs, consisting of reference to decisions of the Greek Courts and opinions of text book writers.

The application is supported by an affidavit dated 25th November, 1983, sworn by Mr. Antonis Paschalides, an advocate at the office of Mr. Eliades, counsel for applicant, to the effect that the said particulars do not form part of the Greek Law and, therefore, they could not be pleaded. The respondents by an affidavit sworn on their behalf by Miss P. Panayi, an advocate at the office of counsel for the respondents, dated 6th December, 1983, in support of their opposition, relying on the opinion of a Greek practising advocate expert in this field, alleged that such matters are material facts which can and should be pleaded.

A supplementary affidavit was filed on behalf of the applicant dated 7th December, 1983, sworn by Mr. Pashalides setting out the opinion given to him by one Gregoris Timayenis described by him as a practising lawyer in Greece specialising in shipping and admiralty matters, as to what are deemed under the Greek Law as sources of the Greek Law and that Court decisions and text books are by no means a source of law. Also that text books and decisions may only be helpful for the interpretation of the law but they are not law once there is no obligation that they should be followed.

Under paragraph 4 of the affidavit filed on behalf of the applicant dated 25th November, 1983, it is contended that the said particulars should be struck out as irrelevant and/or frivolous and/or vexatious and/or embarrassing and/or in abuse of the process of the Court.

In arguing his case before the Court, counsel for the applicant submitted that the respondents could only plead the Greek Law and the rules of Greek Law, which being foreign law was a question of fact and had to be pleaded, but they could not plead evidence intended to be used in support of the exposition of such law by their expert witness. He further contended that in any event decisions of the Greek Courts, text books and other similar sources are not even evidence of Greek Law. He submitted that foreign law can only be proved by expert witnesses who can testify to Court; text books and other material such as foreign judgments cannot be put in as evidence unless they are explanatory of their testimony. Under the Greek Law, counsel submitted, case law is not a source of law and reference to case law can only be made in respect of legal systems which accept case law as a source of law such as the English legal system, the American legal system, the Australian legal system and the systems of a number of Common Law countries. He concluded his address by summing up his argument that he was applying for the striking out any reference to case law of the Greek Courts and opinions of text book writers but not of the legal propositions and the exposition of the rules of law under the Greek Law, and this is the reason why he did not apply for the striking out of other paragraphs in the pleadings of the respondents by which a general reference to the Greek Law is made.

Counsel for the respondents, on the other hand, submitted that the application was unfounded as the particulars given do not amount to matters which are scandalous, irrelevant or interfering with the fair trial of the case. He contended that there was nothing wrong in pleading more particulars of a fact which is in issue and in fact pleading more particulars affords an opportunity to the other side of knowing the facts on which the respondents are going to rely for their defence. Counsel further submitted that the particulars sought to be struck out do not and could not come under the terminology

of abuse of the process of the Court or of being frivolous and vexatious even if they were completely irrelevant and they should not have been pleaded; therefore, since they do not come under these categories, the Court should not strike them out, because the respondents acted properly and in good faith in including these particulars in the pleadings and putting them in issue before the Court. Furthermore Counsel contended that in any case this application is made too late in the day bearing in mind that the pleadings have been concluded and the case had already been fixed for hearing on 23rd May, 1983, and subsequently continued and refixed again in October, 1983. It was the submission of counsel for the respondents that there was such great delay on the part of the applicant which is an indication that, when the pleadings were concluded and the action was set down for hearing, the applicant did not consider that these particulars were prejudicial and the object of the present application is to delay the hearing of the action.

In his reply, counsel for the applicant submitted that there is no delay if one takes into consideration the fact that this application was filed after the respondents sought to re-open the pleadings by their application for amendment of their pleadings.

The question which poses for consideration before me is, whether when foreign law is relied upon and pleaded as a ground of claim or defence, particulars can be given in the pleadings of the case law and of opinions of text book writers and whether the inclusion of such matters in the pleadings can be treated as frivolous, vexatious, irrelevant, embarrassing, or in abuse of the process of the Court.

In Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition at pp. 1071, 1072, under the heading "Foreign Law", it reads as follows:

> "Where a party relies on foreign law to support his claim or as a ground of defence thereto, he must specially plead the foreign law relied on in his Statement of Claim or Defence, as the case maybe, and he should give full particulars of the precise statute, code, rule, regulation, ordinance or case law relied on, with the material sections, clauses or provisions thereof".

It is well settled that the mere fact that an allegation is unnecessary, is not a ground for striking out. (*Rock* v. *Pursell* [1887] 84 L.T.Jo. 45). Nor is a pleading embarrassing because it contains allegations which are inconsistent (*Child* v. *Stenning* [1887] 5 Ch.D. 695) or stated in the alternative, provided they are pleaded clearly and distinctly and in separate paragraphs.

A pleading is not embarrassing merely because it is probable that the allegations made may ultimately turn out to be untrue in fact. The above proposition is in line with the judgment of the Court of Appeal in England in the case of *Turquand and Others v. Fearon* [1879] 15 L.T. 543 in which Bramwell, L.J. had this to say at p. 544:

> "I am afraid that this appeal must be dismissed. In my opinion there is really no pretence for an appeal on the grounds put forward here. It comes to this, that because a man makes an untrue statement, or what is supposed to be an untrue statement, in his pleadings, that statement is to be struck out as embarrassing. His remedy is clearly to take issue upon it".

The same applies to cases where points of law are stated or alleged which may then turn out to be bad. In this respect in *Tomkinson* v. *The South-Eastern Railway Company* (*No.* 2) [1887] 57 L.T. 358 at p. 360, Kay, J. said:

> "The defence put in consists of thirteen paragraphs, and the question raised by this motion is whether the greater portion of them is irrelevant or unnecessary. The motion is made under Order XIX., r.27, which provides that, 'The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action'. In my opinion, a reasonable latitude should be given to that rule. Parties must be allowed to plead reasons why, as in the present instance, a particular act said to be ultra vires is not ultra vires. They may be bad reasons, but they are reasons why the act complained of is not ultra vires; and reasons which the Court will have to consider when the action comes on for trial. To say that all this ought to be struck out would.

it seems to me, be a wrong application of the rule. If the matter sought to be struck out of the defence were utterly irrelevant, then no doubt the rule would apply; but if the Court sees that the defendants have pleaded matters which rightly or wrongly constitute their reasons why the act complained of is not ultra vires, then I think that the rule ought not to be held to apply. It is not the meaning of the rule that any matter alleged in the defence as a reason should be struck out merely because it is a bad reason. The obvious meaning of the rule is to prevent either party to an action from prejudicing, embarrassing, or delaying the fair trial of the action by stating in his pleading utterly irrelevant matter, such as I feel obliged to say one sometimes sees in pleadings. In my opinion, it is quite impossible for me to strike out any part of this pleading—to dissect out of it every little paragraph or statement which it is said goes too far. That is not the meaning of the rule. I cannot say that any part of the defence in the present case is so irrelevant that the rule ought to be applied; and I must, therefore, refuse the motion with costs".

In *Laurence Scott & Electromotors, Ltd., and Others* v. *General Electric Company Ltd.*, [1938] 55 R.P.C. 233, Bennett J., in dismissing a summons by the Defendants in a patent action, for an Order that paragraph 2 of the Reply and Defence to Counterclaim in the action be struck out on the ground that it may be unnecessary and may tend to prejudice, embarrass and delay the fair trial of the action, gave the following reasons (at p. 237):

"..... It is a little difficult to see how it could be said that the Defendants are embarrassed by the Plaintiffs having pleaded facts which they are entitled to prove. It may be—I will express no opinion about it—that the Plaintiffs were not bound to plead in their Reply and Defence to Counterclaim the matters which they have pleaded; but it is clear, I think, from the decision of the Court of Appeal in *Millington* v. *Loring* (reported in L.R. 6 Queen's Bench Division, page 190) that they were entitled to plead them. If they be entitled to do so, that case is an authority, as it seems to me, for the proposition that the Court has

no jurisdiction to strike out the matter so pleaded upon the ground that it is either embarrassing or prejudicial or tends to delay the fair trial of the action".

Apart from the provision in the Rules empowering the Court to strike out pleadings, there is inherent jurisdiction to the Court, under the Common Law, to strike out from the pleadings any matters which are frivolous or vexatious or in abuse of its process. (See *Metropolitan Bank* v. *Pooley* [1885] 10 App. Cas. 210 at p. 220, 221 per Lord Blackburn). This inherent power though distinct from the powers of the Court conferred by the rules is a most important adjunct to those powers (see Bullen & Leake and Jacob's Precedents of Pleadings (supra) at p. 149).

As to the exercise of the inherent jurisdiction of the Court *Lord Herschell* had this to say in *Lawrence* v. *Lord Norreys* [1890] 15 App. Cas. 210 at p. 217:

> "It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional circumstances. 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".

As to when a pleading is frivolous and vexatious, we read in *Bullen & Leake and Jacob's* Precedents or Pleadings (supra) at p. 145:

> "A pleading or an action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus, a proceeding may be said to be frivolous when a party is trifling with the Court or when to put it forward would be wasting the time of the Court or when it is not capable of reasoned argument. Again, a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some fanciful advantage or when it can really lead to no possible good".

Dealing with the first leg of the question before me, that is, whether particulars of foreign law can be given in the pleadings by reference to decided case, it is clear from the authorities I have hereinabove mentioned that once the respondents, by their defence to the counterclaim, seek to rely on foreign law, they should give full particulars of the "*Precise statute, code*, rule, regulation, ordinance, or *case law* relied on" (the underlining is mine). Omission to plead them might prejudice them at the hearing as they might be impeded to introduce such matters when their expert witness will be giving evidence, if an objection is made that they were not pleaded. I cannot, therefore, accept the contention, of counsel for the applicant that such particulars have wrongly been inserted in the pleadings.

I come now to the second leg of the question, that is, whether such matters are irrelevant, frivolous, vexatious, embarrassing or in abuse of the process of the Court as alleged by the applicant. The burden was upon the applicant to satisfy the Court that his allegations were well founded. In the present case, and bearing in mind the authorities to which reference has already been made, and my findings on the first leg of the question, I have come to the conclusion that the applicant failed to discharge such burden. Borrowing the words of Kay, J., in the *Tomkinson* case (supra), in the circumstances of the present case, "It is impossible for me to strike out any part of this pleading—to dissect out of it every little paragraph or statement which it is said goes too far. That is not the meaning of the rule".

In answering the question before me, I cannot agree with applicant's counsel that the matters objected to are irrelevant and have been wrongly pleaded. Therefore, this application has to be dismissed.

Before concluding on this issue, I cannot overlook the fact that counsel for the applicant, by his own pleadings, under paragraphs 16 and 17 of his defence and counterclaim in his particulars of the Greek Law, makes extensive reference to the Greek Civil Code and decided cases with extracts therefrom, a fact which imposed upon the respondents the duty and at the same time gave them the right to answer such pleading with a similar reference to decided cases. In answer to an observation made by the Court to counsel for the applicant, in the course of

his address, as to the above, counsel for the applicant said that such reference by him to decided cases was made by mistake and he was ready to accept that such particulars be struck out from his pleadings. Such statement, however, cannot be accepted, as, on the one hand it came too late in the day and, on the other hand, no steps had been taken by him for amending his pleadings accordingly.

Assuming that I had reached a different conclusion on the question as to whether the matters complained of should have been pleaded, I would not have been prepared to exercise my discretion in favour of granting this application which was made at this very late stage of the proceedings.

The pleadings in this action had been closed early in 1983 and the action was set down for hearing in May, 1983 and was subsequently adjourned to 31st October, 1983, when a witness for the respondents-plaintiffs was heard. Due to a number of interlocutory applications filed by such date, the continuation of the hearing was adjourned, so that the Court in the meantime, would have dealt and disposed of such applications. In November, 1983, the respondents filed an application for amendment of their pleadings which, however, they did not pursue and shortly thereafter they withdrew same. The pleadings in their final form were in the hands of counsel for the applicant since early 1983 and long before the hearing of the action had commenced. If counsel for the applicant had any reason to dispute that any matter mentioned in the respondents' pleadings were improperly pleaded, he should have acted promptly and within a reasonable time to have them struck out. I cannot accept the argument of counsel for the applicant that the respondents by their application in November, 1983, for amendment of their pleadings, which they subsequently abandoned, opened the door to them for filing the present application. The door was already open to them a long time ago and if they had any objection to the pleadings, they could have had recourse to the Court in time.

It is a well settled rule that, although the application may be made at any stage of the proceedings, it should always be made promptly. In *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Company* [1892] 3 Ch.

274, it was held that an application to strike out pleadings should be made by the defendant before filing his defence.

It is only in exceptional circumstances that it may be made after the close of pleadings but in any event the Court may refuse to hear such an application after the action is set down for trial. In *Cross* v. *Earl Howe* [1892] 62 L.J (N.S.) Ch. 342, an application to have plaintiff's statement of claim struck out as frivolous and vexatious, the Court refused the motion, which would otherwise have been acceded to, on the ground of delay once the action was set down for hearing. North, J. had this to say in his judgment:

> "My only difficulty is the lateness of the application. I do not think I can stop the action at this stage".

Allowing applications of this kind after such long delay and after the action is set down for hearing, or the hearing has commenced would amount to availing a party, wishing to postpone the hearing, the opportunity of achieving his target by taking steps to have any averment in the pleadings struck out.

In the result the application is dismissed with costs in favour of the respondents.

Application dismissed with costs in favour of respondents.