In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 317

BETWEEN:

KATE RANSOM WILSON GRAYKEN

Plaintiff

- and -

JOHN PATRICK GRAYKEN

Defendant

Dates of Hearing: 14th June 2010
Date of Judgment: 5th July 2010

Mr. Alan Dunch for the Plaintiff; and
Mr. Paul Smith for the Defendant.

RULING

INTRODUCTION

1. This ruling is given on the plaintiff's application by summons issued on 22nd April 2010 seeking leave to amend the Points of Claim. The action was commenced by writ issued on 7th November 2007. The Points of Claim were served with the writ. The defendant entered a memorandum of appearance on 16th November 2007, and filed his Defence on 20th December 2007. There was a Reply on 23rd April 2008, and then a lull until a notice of intention to proceed was filed on 16th January 2009. It seems that there was also a request for further and better particulars of the Defence at that time, and those particulars were then given on 27th February 2009. There was then a further lull, and a further notice of intention to proceed was filed on 17th March 2010, followed by this summons.

2. The original Points of Claim is a substantial document, running to 153 paragraphs. It sought damages for breach of contract, an account and declarations concerning the correct treatment of certain assets for contractual purposes.

3. The parties were previously husband and wife. The husband is a rich and successful businessman. The contract alleged to have been broken is an Agreement Incident to Divorce ('the Agreement'), which contained complex provisions for establishing the wife's entitlement on the breakdown of the marriage. The alleged breach of contract concerns the classification of an asset, known as the Tsunami I, for the purposes of the Agreement. While the original claim simply alleged that the way this was classified was a breach of the Agreement, the proposed amendments also seek to plead causes of action in fraudulent misrepresentation, negligent misrepresentation, mistake so as to support a claim for rectification, and additional breaches of contract (together the 'new causes of action').

4. While such an amendment would, under ordinary principles, probably be unobjectionable, in this case there is an argument that the new causes of action are now statute-barred, although they may not have been at the time of the issue of the writ[1]. In such a case an amendment to add them is only permissible if the new causes of action arise "out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."[2]

THE LAW

5. The principles were considered by the English Court of Appeal in Paragon Finance plc v D. B. Thakerar & Co. [1999] 1 All ER 400, at 404:

> "The proper approach to an application for leave to amend in such circumstances was considered by this court in *Welsh Development Agency v Redpath Dorman Long Ltd. [1994] 4 All ER 10, [1994] 1 WLR 1409*. The court observed that a new

[1] Even that is not accepted by the defendant.
[2] See RSC 1985, Ord. 20, r. 5(2) and (5)

claim is not made by amendment until the pleading is amended. It follows that the relevant date for the purpose of calculating the limitation period is the date at which the amendment is actually made, which by definition must be no earlier than the date at which leave to make the amendment is granted. The court also held that leave to amend by adding a new cause of action should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim or that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which he has already claimed relief. By this means the injustice to the defendant of depriving him of an arguable limitation defence is avoided without denying the plaintiff the right to bring a fresh action to which, if he is correct, there is no limitation defence."

6. In Bermuda, that approach was followed and applied by the Court of Appeal in The Bank of Bermuda Limited v Dilton Robinson (Civ. App. No. 17/2001)(28 Nov. 2002):

"Rules of the Supreme Court, Order 20 r.5

Order 20 rule 5 is the governing Rule of Court. Its terms are well known. We do not need to set them out here. They reflect, as Mr. Pymont, who now appears for the Bank, observes, the historic principles applied by the courts, in particular that "amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments": per Lord Esher M.R. *Weldon v Neal* (1887) 19 QBD 394 at 395. Such prejudice would arise when a time bar expires during the period between the writ and the amendment sought, for the amendment, if made, takes effect as at the date of the issue of the writ.

Dr. Roberts, who now appears for Mr. Robinson, suggests that this is no longer the rule, relying on the well known words of Lord Denning M. R. in *Chatsworth Investments, Ltd. v Cussins (Contractors), Ltd* [1969] 1 All E. R. 143 at 145. With the very greatest respect we do not take those words as conferring carte blanche on judicial whim.

There is no difficulty in applying Order 20 rule 5 when the facts are clear or not in dispute. The court can then easily discern whether the defendant will or will not be prejudiced by the amendment. But difficulties can and do arise when the facts are not clear or are in dispute. This is more likely when, as in the present instance, fraud or deliberate concealment is alleged. Questions then arise as to when the plaintiff discovered the relevant facts or when he could with reasonable diligence have done so. These are questions which can only be resolved with confidence upon a full enquiry, which may involve disclosure, examination and cross-examination of parties and their witnesses and even perhaps, Mr. Pymont

suggests, expert witnesses. Such an undertaking is not feasible upon an application for leave to amend.

The practice in England and Wales, when this situation occurs, is to be found in *Welsh Development Agency v Redpath Dorman Long Ltd. [1994]* I WLR 1409 where the Court of Appeal adopted the dictum of Purchas L.J. in *Grimsby Cold Stores Ltd. v Jenkins & Potter (1985*) 1 Const. LJ 362 at 370

> "that leave to add a new party should [not[3]] be given unless it can be shown that the defendant did not have a reasonably arguable case on limitation which would be prejudiced by the additional new claim."

but expressed it in the negative

> "Our view is that Judge Hicks was correct in concluding that where section 35(1) does, or may well, give the plaintiff an advantage a different test, namely that enunciated by Purchas L.J. in the *Grimsby Cold Stores case*, should be applied. In such a case, leave to amend by adding a new claim should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim, or can bring himself within R.S.C., Ord. 20, r. 5."

If the plaintiff so shows, the judge will readily grant leave, for he will have been satisfied that there was no prejudice to the defendant. But if the judge is not so satisfied and refuses leave, the plaintiff is not thereby put out of court. It is still open to him to raise the new claim in a separate action. This is confirmed by Millet L.J. in *Paragon Finance PLC v DB Thackerar & Co* [1999] 1 All ER 400 at 418.

> "In my judgment Timothy Lloyd J should not have been satisfied on the material before him, in summary proceedings in the absence of discovery and without the benefit of cross-examination, that the plaintiffs could not with reasonable diligence have discovered the fraud before the relevant date. This is not to say that he should have reached a concluded view. He should have refused leave to amend and left all to play for in fresh proceedings."

No affidavit was filed in the court below, but the judge appears to have been satisfied that the allegations made in the Statement of Claim were in themselves sufficient evidence. With respect that is unacceptable."

7. Given the state of the law, the issue before me is whether the new causes of action arise out of the same or substantially the same facts as the causes of action already

[3] In fact the Court of Appeal misquoted the dictum of Purchas LJ by missing out this 'not'.

pleaded. The plaintiff obviously says that they do, while the defendant says that properly considered they do not, and relies upon the following from Paragon Finance plc v D. B. Thakerar & Co. (*supra*) at 418 g – j:

> "Whether one cause of action arises out of the same or substantially the same facts as another was held by the court in *Welsh Development Agency v Redpath Dorman Long Ltd. [1994] 4 All ER 10, [1994] 1 WLR 1409* to be essentially a matter of impression. In borderline cases this may be so. In others it must be a question of analysis. In the *Thakerar* case Chadwick J observed that it would be 'contrary to common sense' to hold that a claim based on allegations of negligence and incompetence on the part of a solicitor involved substantially the same facts as a claim based on allegations of fraud and dishonesty. I respectfully agree. In all our jurisprudence there is no sharper dividing line than that which separates cases of fraud and dishonesty from cases of negligence and incompetence."

THE ORIGINAL PLEADING

8. Against that background it is necessary to look at the case as originally pleaded. As noted above, the original points of claim is a substantial document, and the following summary is not intended to reflect all its nuances. The plaintiff pleads that the parties were first married in Nashville in the USA on 1st September 1990. The husband then became extremely successful. In September 1998 the parties entered into a post-nuptial agreement and an addendum, which were both governed by the law of Texas. The addendum provided that once divorce proceedings were issued, the wife could either accept the terms of the post-nuptial agreement, under which she would get 25% of the husband's after-tax net worth as at the filing date of the Petition, or seek alternative relief through the courts. The husband, if he so chose, had the right to force a decision within a 30 day period. In December 2000 the husband is said to have decided he no longer wanted to be married, and there followed a period of negotiation between the parties and their respective advisors. It is the wife's case that the husband and his advisors were pressuring her to proceed swiftly with the filing of a Petition, while giving inadequate financial disclosure. In particular the husband offered to waive the 30 day decision period if the wife filed her divorce Petition by a certain date, and he also made a settlement proposal which was that she would receive a percentage of the distributions that he would

receive from certain real estate investment funds that he managed ('the Funds'). The percentage would differ depending on whether the underlying assets were acquired before or after the date of filing of the Petition. She would receive 25% of the distributions in respect of assets owned by the Funds on the date of the Petition, and 10% (with a $10M cap) of distributions in respect of after-acquired assets. Those assets came to be called "the Class A" and "Class B" assets respectively. The Petition was then filed on 24th January 2001.

9. It is the plaintiff's case that during the period of the negotiations leading up to the filing of the Petition, the husband failed to disclose that on the morning following the filing date the husband would conclude a deal with the Japanese government under which one of the Funds acquired a very valuable asset, namely a Japanese Bank. The asset came to be known as Tsunami I, and that is how it is referred to in the pleadings. However, it is the wife's case that that acquisition continued to remain secret and unknown to her. Moreover, it is her case that she and her advisors were receiving assurances and warranties from the husband and his advisors that the financial position of the funds had not materially changed since 30th November of the preceding year. In particular the wife relies on assurances to that effect given on 5th March and 10th April 2001.

10. The disclosure that the wife did receive was such as to cause her plump for the settlement proposal over what she would get under the post-nuptial agreement. It is the her case that the representations of 5th March and 10th April were misrepresentations in that they failed to disclose the acquisition (or imminent acquisition) of Tsunami I for a consideration of $342M. In paragraph 64 of the original pleading it was alleged that this failure to disclose "was a deliberate withholding of information that was intended to deceive Mrs. Grayken and her counsel." And in paragraph 68 it was pleaded that the settlement was based "upon misrepresentations made by Mr. Grayken and his advisors which representations were in fact knowingly and intentionally false."

11. Settlement negotiations continued, and on 10th April 2001 the parties signed the Agreement which is the subject matter of this action, and which is expressly governed by

Bermuda law and subject to the exclusive jurisdiction of the Bermuda courts. The terms of the settlement were then embodied in a Consent Order filed in the High Court in England on 27th April 2001. The final decree of divorce was then pronounced on 11th June 2001.

12. By the end of July 2001 the parties reconciled, and planned to re-marry on 1st September 2001. A pre-nuptial agreement was proposed, embodying all the terms of the divorce settlement. Further financial disclosure was given. This revealed an increase in the husband's net worth and in the projections of what the wife would receive. It is the wife's case that this was largely due to the inclusion of Tsunami I, but that acquisition was still not expressly disclosed, and she and her advisors were compelled to continue to rely upon the inadequate disclosure provided by the husband and his advisors. The pre-nuptial agreement and an amendment to the Agreement ('the first amendment') were then both executed on 17th August 2001. They are both expressly governed by Bermuda law and subject to the exclusive jurisdiction of the Bermuda courts.

13. The remarriage occurred on 1st September 2001, but it did not last. The parties separated again on 6th November, the husband acknowledging that he had a child by another woman, and on 12th December 2001 the husband petitioned for nullity. In connection with that the parties entered into another round of negotiations and there was a second amendment to the Agreement, again governed by Bermuda law and subject to the exclusive jurisdiction of the Bermuda courts, which was concluded on 22nd January 2002. A further consent order was also agreed on the same date. However, it is again said that Tsunami I was not included in the list of assets or expressly disclosed, although the husband's net worth was shown as continuing to rise quite sharply, as were the Class A assets and the wife's projected receipts.

14. The plaintiff pleads that this happy state of affairs continued until May 2003, with the income generated by Tsunami I being distributed to the parties, although it is said that its existence remained unrevealed. In the meantime, in order to reassure the wife as to the correctness of her distributions a representative of the Funds certified the accuracy of the

underlying calculations. In addition, an independent firm of accountants, Ernst & Young, was retained by the husband but on terms that they owed a duty of care to the wife, to provide a similar assurance. It is the wife's case that throughout this period the husband and his team were, by necessary implication, treating Tsunami I as a Class A asset. However, on 16th May 2003 Ernst & Young revised their certification for 2002 to allow Tsunami I to be reclassified by management as a Class B asset. This was forwarded to the wife's investment advisor, without any explanation, on 9th December 2003, and was simply filed away until April 2004 when a decrease in the payments to the wife caused it to be re-examined. The wife pleads that at some point after 22nd April 2004 the nature of the reclassification was communicated to the wife's tax advisor, the implication being that it was not until then that its full significance was appreciated.

15. It is the wife's case that the reclassification was a breach of the Agreement as amended from time to time. She says that the loss to her occasioned by the reclassification is immense, because she loses the value of the income from Tsunami I from the Class A assets, while she has reached (or will quickly reach) the $10M cap on the distributions from the Class B assets.

16. The original pleading concluded with a section headed "The Claim". In that section, in paragraphs 143 – 148, the plaintiff pleads loss[4]. Then in paragraphs 149 and 150 she pleads:

> "149. In the premises, Mr. Grayken owed Mrs. Grayken a duty to provide full, frank and clear disclosure and to act in good faith in disclosing the totality of his assets up to and including each of the agreements referred to above. As a result of the failure to disclose the asset Tsunami I, Mrs. Grayken and her advisors were

[4] In very brief summary the loss is pleaded as follows:
143 – the reclassification will cause her to receive less;
144 – to date she had received less than one-half of the amount projected at the time of the second amendment to the agreement;
145 – the reclassification prevents her participating in the substantial returns from the Lone Star Fund III;
146 – the actual loss will be significantly more than "shown above";
147 – a sale of one third of Tsunami I in October 2005 netted $784M, so that the returns should have been huge;
148 – she will not realize her expected returns.

> put into a detrimental position and were misled into believing that the projections and net effect schedules would have provided substantially greater funds than they will now provide based upon the reclassification of Tsunami I. Indeed, Mrs. Grayken claims that she would never have entered into the agreements as drafted had appropriate disclosure of the acquisition of Tsunami I been made during the negotiations of each of the agreements.
>
> 150. Each of the agreements and Court Orders required full, frank and clear disclosure by Mr. Grayken. However, in connection with the negotiations for each of the agreements he failed to disclose the acquisition of Tsunami I, thereby breaching his obligations in this regards. Accordingly, Mrs. Grayken claims a return of the asset Tsunami I to its status as a Class A asset and the restoration of the appropriate payments to Mrs. Grayken that would have been made under such a classification up to and including the present time and going forward until the depletion of the cash flow of the asset."

17. Paragraph 151 then pleads equitable estoppel by conduct, the conduct being the projected cash-flows from the classification of the asset during 2001-2003. Paragraph 152 pleads that the husband has been unjustly enriched. And then in paragraph 153, the pleading avers that Tsunami I was acquired on or before 24th January 2001, and was therefore properly treated as a Class A asset for over two years, and should continue to be so treated.

18. There then follows the formal prayer, which claims:

> "1. A declaration that the asset Tsunami I was and remains a Class A asset for the purposes of all the Agreements above pleaded;
>
> 2. A declaration that the unilateral reclassification of Tsunami I to a Class B asset by Mr. Grayken and Hudson [*the fund manager*] was unlawful and in breach of the Agreement above pleaded;
>
> 3. An account in respect of all sums due and owing to Mrs. Grayken as a consequence of the unlawful reclassification of Tsunami I;
>
> 4. Damages for breach of contract;
>
> 5. Such further and other relief as to this Honourable Court may seem full and equitable; and
>
> 6. Costs."

THE PROPOSED AMENDMENTS

19. The defendant does not object to all of the proposed amendments, some of which are mere tidying up. The matters which are objected to are identified in an email from counsel of 13th June 2010, they being categorized as "the paragraphs in which you advance the new claims of fraudulent misrepresentation, negligent misrepresentation and mistake", and those paragraphs are then listed. They tend to fall into clusters, and I will treat them accordingly.

Paragraphs 30-32D

20. The old paragraph 30 - 32, which dealt with representations prior to the filing of the first divorce petition, are deleted and replaced by paragraphs which allege: a duty of care in the respect of the truth and accuracy of the information provided [30A]; the representations said to have been made on 24th January 2001 [30B]; an intent that the information provided would induce the wife to file later that day [30C]; that she relied upon the information and was so induced [31]; the falsity of the information [32]; that the inducements were made fraudulently in that the husband knew they were false or was reckless as to whether they were true or false [32A]; in the alternative, that they were made negligently [32B]; that the wife would have acted differently had they not been made [32C]. The representations are then pleaded as continuing through 10th April 2001, so as to place a duty on the husband to inform her when they ceased to be true, which he did not do [32D].

Paragraphs 37A-37B

21. These are new and simply plead that the husband intended the financial data supplied during the settlement proposals to be relied upon, and the wife and her advisor were never told that it could not be relied upon.

Paragraphs 55-57

22. The old paragraphs 55 to 60 are deleted, and replaced by new ones which plead that: at no time between 24th January and 10th April 2001 did the husband inform the wife that the continuing representations made at the meeting on 14th January (sic) had ceased to be

true, and indeed they reiterated them [55]; the husband owed a duty of care to ensure their truthfulness [55A]; the representations had no other purpose than that she would rely upon them [55B]; the representations were intended to be and were relied upon in relation to the agreement of 10th April 2001 [56]; the representations were false, as set out in paragraphs 61-69 [57].

Paragraphs 62-69A

23. There is an addition to paragraph 62 which pleads the date of the closing of the Tsunami transaction as 30th January 2001, and I do not think that an objection is really made as to that (although it is not entirely clear whether it is intended to plead the date or evidence of the date). The document then pleads that: the standard in English proceedings is that disclosure should be full, frank and clear [63A]; the acquisition of Tsunami I rendered the representations false, with an explanation and particulars [63B and 63C]; the representations made in the Acknowledgement of 10th April 2001 were made fraudulently in that the husband either knew they were false or was reckless as to that [63D]; the wife was deceived [addition to 64]; reliance on the representations led to the English consent order of 27th April 2001 [addition to 67]; if she had known the truth, the wife would have insisted on Tsunami I being listed as a Class A asset or, if that was refused, sought alternative relief in the courts [69A].

Paragraphs 78A-79C

24. These contain similar pleadings to the above in respect of the acknowledgement and pre-marital agreement of 17th August 2001. The old paragraphs 79 and 80, which simply pleaded the representations, are deleted.

Paragraphs 96-97E

25. These again contain similar pleadings, this time in respect of the Net Effect Schedule, which was Schedule A to the second amendment, which took place at or about the time of the nullity Petition in December 2001/January 2002. In this case it is breach of duty to exercise reasonable care and skill only, and not fraud, which is pleaded.

Paragraphs 105A-D

26. These plead "Mistake", apparently in support of the plea for rectification. It is alleged that the wife entered the agreements in the mistaken belief that all assets acquired by the Funds as at 24th January 2001 had been included in Class A [105A]; that the husband knew that she believed that, and that the categorisation of assets would not be unilaterally changed [105B]; and that in view of that knowledge it would be inequitable for him to rely on the strict terms of the Agreement [105C]. On that basis the wife claims to be entitled to, and seeks, rectification to include Tsunami I as a Class A asset.

Paragraphs 112A and 128

27. This pleads an implied term that the husband would not interfere with or improperly influence Ernst and Young in the provision of their certifications [112A]. There is then an allegation that the reclassification was "unlawful, invalid and of no effect", and a further allegation that it was in breach of that implied term [128];

Paragraphs 143 and 146

28. These are part of the section previously headed "The Claim", although that heading is itself now to be deleted. Paragraph 143 is amended by adding an allegation that the reclassification constituted a breach of the Agreement. Paragraph 146 is substituted by a pleading that the reclassification has caused the wife loss and damage, with particulars that her entitlement is to damages to put her in the position she would have been in had the husband performed the Agreement.

The Prayer, paragraphs 1 and 2

29. Paragraph 1 of the amended Prayer becomes a claim for "damages for fraudulent, alternatively negligent misrepresentation." The new paragraph 2 would then be a further or alternative prayer for an order for rectification of the Agreement by the inclusion of Tsunami I as a Class A asset. The addition to the Prayer of a claim for Specific Performance of the Agreement is apparently not objected to.

CONCLUSIONS

30. On the face of it the new causes of action in fraud, negligence and mistake accrued at the latest with the making of the second amendment to the Agreement on 22nd January 2002. They are, therefore, *prima facie* statute-barred, being outside the six year limitation period. It is not entirely clear whether the plaintiff seeks to rely upon the exception contained is section 33 of the Limitation Act[5], but she would face two problems with that. The first is that the matter has to be judged as of the date when the court is considering the amendment, not the date of the summons to amend[6]. Even taking the pleadings at face value it is hard to see that the wife alleges a date after 14th June 2004[7] for when she discovered the fraud, concealment or mistake. The second problem is that, even if the pleadings did allege a later date, that is not sufficient. It requires evidence, as the Court of Appeal said in the Dilton Robinson case (*supra*):

> "No affidavit was filed in the court below, but the judge appears to have been satisfied that the allegations made in the Statement of Claim were in themselves sufficient evidence. With respect that is unacceptable."

31. Against that the plaintiff argues that I should not be considering this now, as the defendant has already pleaded limitation, and would not be deprived by the amendment of the opportunity to run a limitation defence at trial. I think, with respect, that that is misconceived. If I allow the amendment it relates back to the date of the original writ. That may be within the six year period from when the plaintiff discovered the fraud, concealment or mistake. In other words the defendant may have a valid defence today,

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[5] **Fraud; concealment; mistake**
33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either —

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

[6] See Paragon Finance plc v Thakerar [1999] 1 All ER 400 at 404 (cited above), where it was said:
"It follows that the relevant date for the purpose of calculating the limitation period is the date at which the amendment is actually made, which by definition must be no earlier than the date at which leave to make the amendment is granted."

[7] i.e. 6 years prior to the hearing date of 14th June 2010.

which would be overridden or prejudiced by the amendment. In those circumstances I do not think that the plaintiff can succeed in showing that the defendant does not have a reasonably arguable case on limitation that would be prejudiced by the new claim.

32. That leaves the provisions of Ord. 20, r. 5(5). Even though a limitation period current at the date of the writ has expired, the Court may nevertheless allow the amendment "if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action . . ." In my judgment the wording of that is important, and has to be strictly construed. What it requires is that the facts have to be the same as those in a cause of action in respect of which *relief has already been claimed*. It is not enough if the facts now relied upon have been pleaded in an earlier pleading if they were not necessary for a cause of action for which relief was claimed in that earlier pleading.

33. The problem is that, although the original pleading contained allegations of "deliberate withholding" of information [64], and misrepresentations which "were in fact knowingly and intentionally false" [68], those allegations were not necessary for the then cause of action, which was for breach of contract in the re-allocation of the Tsunami I from Class A to Class B by Ernst & Young in or about May 2003. That cause of action would have only involved a consideration of when the asset was acquired and what the contractual cut-off date was. The allegations of deliberate concealment of the original acquisition of the asset have no direct bearing on those issues, although they may have some narrative relevance to explaining how events unfolded. Those allegations did not, therefore, themselves give rise to causes of action which were pleaded in the original pleading, nor at that stage did they give rise to claims for relief.

34. I think, therefore, that on a proper analysis of the pleadings, the new causes of action are not within Ord. 20, r. 5 and are not permissible. I therefore refuse leave to amend to add them. I should add that, were I wrong in respect of the causes of action which centre around concealment and misrepresentation, I would nevertheless have found the new cause of action (introduced by paragraph 112A and the additions to paragraph 128) for

breach of an implied term that the husband would not interfere with Ernst & Young's certification, wholly outside the previously pleaded facts, both as to the duty alleged and as to its breach.

35. On the other hand, I do not think that the addition to paragraph 143 and the substitution of paragraphs 145 and 146 are objectionable. They do not plead a new cause of action, but rather the loss flowing from the old. I therefore allow those amendments. I also allow all the other proposed amendments to which no specific objection was taken, on the usual terms as to costs.

36. I will hear the parties on the costs of the hearing, although it is hard to see why they should not follow the event.

Dated this 5th day of July 2010

Richard Ground
Chief Justice