

DOMAN v TALTOS and others

Supreme Court (in chambers)

Spry, C.J.

8 October 1976.

Practice and procedure — pleadings — statement of claim unsigned — no-one capable of signing — whether curable RSC Ord. 2, r. 1; Ord. 6, r. 5; Ord. 18 rr. 6 (5) and 15; Ord. 67 r. 4.

Practice and procedure — pleadings — whether irregularities can be waived.

The plaintiff failed to comply with an order to file a statement of claim but his London solicitors sent to the solicitor for the City Bank Ltd., one of the defendants, an unsigned document in the form of a statement of claim. The Bank applied for leave to waive the irregularities in connection with the statement of claim and to file a defence and counterclaim.

Held: (i) The purported statement of claim, which could not properly have been signed by anyone, was a nullity.

(ii) Since the document was a nullity, there could be no question of curing irregularities.

Case referred to in the order.

Fick and Fick Ltd. v Assimakis, [1958] 3 All E.R. 182.

Application

This was an application by one of the defendants in the action for leave, inter alia, to waive irregularities in connection with a document alleged to be a statement of claim.

S. Benady, Q.C., and P.J. Isola for the applicant.

11 October 1976: The following order was read—

This is an application by chamber summons taken out by the City Bank Limited, the sixth defendant, asking for leave:—

1. To waive the irregularities in connection with the plaintiff's statement of claim and
2. To file out of time the defence and counterclaim of the Bank.

Mr. S. Benady, Q.C., appeared with Mr. P.J. Isola, for the Bank. Sir Joshua Hassan, Q.C., appeared as a courtesy since Messrs. J.A. Hassan & Partner are the solicitors on the record, although they no longer represent the plaintiff.

When the matter last came before this court, on 27 August 1976, my learned predecessor treated an application then before him as a summons for directions and directed that the statement of claim, which was then already out of time, be filed within 14 days, that the defence and counterclaim be filed within 14 days of the service of the statement of claim and that any reply be served within 14 days of the receipt of the defence and counterclaim.

It is questionable whether there has been any compliance with the first of these directions, and this application is brought because the Bank cannot file its defence and counterclaim until the statement of claim has been served and the Bank is anxious to bring to early trial the one issue in which it is really interested. This concerns the ownership of certain moneys, which are at present frozen, and I am satisfied that this issue ought to be decided with the minimum of delay.

Mr. Benady has argued that he has been sent, by the plaintiff's London solicitors, a document that meets all the requirements of a statement of claim except that it is not signed and was out of time. He submits that these are formalities that can be waived under RSC Ord. 2, r.1. As regards the reference in my learned predecessor's order to filing the statement of claim, Mr. Benady argued that while filing is a local practice, it is not a statutory requirement, and he suggested that the use of the word "filed" instead of "served" might have been a slip.

The one question that I have found difficult to decide is whether there is a statement of claim in existence. If there is, I have undoubtedly a very wide discretion to cure irregularities. If, however, there is no statement of claim in existence, there can be no question of curing irregularities, because nothing can be built on nothing. Moreover, it would be entirely wrong to allow a defendant, under the pretext of waiving irregularities, in effect to take, on the plaintiff's behalf, a step which the plaintiff could not or did not wish to take.

I may remark here that I have considered the judgment of Lord Evershed, M.R. in *Fick and Fick Ltd v Assimakis*¹ but I do not think it is of any assistance

¹ [1958] 3 All E.R. 182.

because it was delivered before the present RSC Ord 2, r. 1 was enacted.

Having regard to the terms of that rule, which could hardly have been expressed more widely, I do not think that the lack of a signature need necessarily invalidate a statement of claim, although a court would have to exercise caution in recognising an unsigned one. I think the tests that should be applied are, first, whether the document complies with the requirements of RSC Ord. 18, r. 15 or so nearly complies with them that reasonable amendment is all that would be necessary, secondly whether it was sent to the defendant in circumstances that show that service of a statement of claim was intended and, thirdly, whether, at the time when it was so sent, there was someone capable in law of signing it.

Applying those tests to the present case, the document with which I am concerned appears fully to comply with RSC Ord. 18, r. 15. As regards the second test, I think I am entitled, and ought, to look at the correspondence addressed to the Registrar, even though it is not formally part of the record. Two letters are particularly relevant. The first was written by Messrs. Woodham, Smith, Greenwood and Holland, the London solicitors of the plaintiffs. After referring to the order of 27 August and to the fact that the plaintiff is unrepresented in Gibraltar, they say:—

“We are therefore requested by Mr. Doman to submit a further copy of the Statement of Claim to the Court, in an endeavour, so far as he is able, to comply with that Order.

A copy of this letter and of the Statement of Claim has been forwarded to J.A. Hassan & Partners and to Messrs. Benady & Benady, who are the solicitors for the only other party involved in this action at the present time.”

The importance of this letter is that it contains an unequivocal statement that the plaintiff was attempting to comply with the directions of 27 August so that the sending of the copy letter and the copy “statement of claim” to Messrs. Benady & Benady might be interpreted as an intended service.

The other letter to which I would refer is later in date and was written by the plaintiff himself. In it he said:—

“I still do not understand the implications and legal consequences of the issuance of the writ, nor do I understand the implications and legal consequences which are attached to the statement of claim which was prepared by London counsel. I need legal advice on these matters, particularly as to your suggestion that I might sign the statement of claim..... In connection with the statement of claim, I ought to know what my capacity is as the so-called plaintiff”.

I would remark in passing that the Registrar had not suggested that the plaintiff might sign the statement of claim, but had informed him that he could file it himself.

This letter could be read as indicating that the plaintiff had not yet made a statement of claim, but after full consideration and looking at the letter as a whole, I think he was merely seeking advice and that the remarks I have

quoted are not contradictory of his solicitor's letter. It is also, I think, clear that the letter was not intended as a retraction or repudiation of his solicitor's letter, or it would have been expressed in very different terms.

I now come to the question whether the irregularity is of such a nature as to be capable of being cured. I have already mentioned that the firm of J.A. Hassan & Partner, though still the solicitors of record, are no longer acting for the plaintiff. A person who has no address within the jurisdiction cannot sue in person (RSC Ord. 6, r. 5), such a person must sue by a solicitor, as the plaintiff did. He can change his solicitor, like anyone else, but it appears to me that he cannot take over the action and proceed in person unless he first establishes a genuine address for service in the jurisdiction (RSC Ord. 67, r. 4). This the plaintiff has not done. Therefore, in my view, the plaintiff himself could not have signed the statement of claim. His London solicitors could not have signed it, because they are not solicitors of this court. The statement was not, as far as I am aware, settled by counsel of the Gibraltar Bar. Messrs. J.A. Hassan & Partner could not sign it because they had notified the plaintiff that they could no longer act for him and he had accepted their withdrawal. There was no-one, therefore, who could sign the statement of claim in accordance with RSC Ord. 18, r. 6 (5). If, at the material time, there was no-one capable of signing a statement of claim, I do not think a statement could have come into existence and it is immaterial whether or not the plaintiff intended to serve one or believed that he had served one. I think the document that has been referred to as a statement of claim can be regarded as nothing more than a draft.

It follows that there can be no question of allowing the waiver of irregularities in connection with the statement of claim. Similarly, there can be no question of extending time for filing the defence and counterclaim, since that time has not arrived. The Bank has my sympathy, but the application must be, and is, dismissed.