1942

Oct. 20

Dec. 10

BETWEEN:

BARON EDOUARD de ROTHSCHILD, GERMAINE HALPHEN, wife separate as to property of the said Baron Edouard de Rothschild, MISS BETHSABEE de ROTHSCHILD, and JACQUELINE de ROTHSCHILD, wife separate as to property of Gregor Piatagorsky, all of the City of New York, State of New York, United States of America... PLAINTIFFS,

AND

THE CUSTODIAN OF ENEMY PROPERTY ..... DEFENDANT.

Practice—General Rules and Orders, Rule 114—Impertinent or irrelevant matter in pleadings—Rule to be applied only in clear cases—Disputed issues of law not to be tried on motion under Rule.

Held: That while Exchequer Court Rule 114 provides that the Court or a Judge may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action, such an order should not be made unless the matter complained of is clearly impertinent or irrelevant or is clearly a breach of the rules of pleading.

2. That impertinent matter in a pleading is such matter as is not pertinent to the questions in issue and can have no bearing upon them. Matter ought not at the commencement of a suit to be treated as impertinent which may at the hearing be found relevant.

3. That disputed issues of law are not to be tried on a motion under Rule 114.

MOTION under Rule 114 to strike out paragraphs in Statement of Claim as being impertinent or irrelevant.

The motion was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

D. L. McCarthy, K.C. and *F. Read* for the motion.

E. F. Newcombe, K.C. and *K. Archibald contra.*

The PRESIDENT, now (December 10, 1942) delivered the following judgment:

This is a motion by counsel for the defendant for an order to strike out certain paragraphs of the plaintiffs' statement of claim, made under the provisions of Rule 114 of the General Rules and Orders of the Exchequer Court of Canada, reading as follows:

> The Court or a Judge, may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action.

The action is brought for a declaration by the Court as to whether or not certain securities, namely 1,534,000 florins Royal Dutch Company capital stock held by the Royal Bank of Canada, Montreal, for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, have been at any time on and since the 2nd day of September, 1939, subject to the Consolidated Regulations Respecting Trading with the Enemy (1939).

Before this action could be brought it was necessary to obtain the consent in writing of the Custodian of Enemy Property as required by section 27 of the above Regulations, which reads as follows:

> 27 (1) In case of a dispute or question as to whether or not any property belongs to an enemy or is subject to these Regulations the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration, as to the ownership thereof or as to whether or not such property is subject to these Regulations.
>
> (2) The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.
>
> (3) No mandamus proceedings shall be taken against the Custodian to obtain his consent, nor shall any proceedings by way of petition of right be instituted by any claimant where the Custodian has, under paragraph (1) hereof, refused a consent.

The consent of the Custodian, dated May 20th, 1942, was filed in the Exchequer Court with the Statement of Claim on August 28th, 1942.

From this consent it appears that the plaintiffs, on August 1st, 1940, applied to the Custodian for the release of the capital stock in question and that the Custodian was prepared to release control over it on payment of a

1942

BARON EDOUARD DE ROTHSCHILD ET AL. v. CUSTODIAN OF ENEMY PROPERTY

Thorson J.

commission of 2 per cent. on its value, but that the plaintiffs contested the right of the Custodian to charge any commission. Thereafter the plaintiffs applied for the consent of the Custodian to take proceedings in the Exchequer Court. This consent was given on May 20th, 1942.

The operative portion of the consent, apart from its recitals reads as follows:

> NOW THEREFORE the Custodian hereby consents to the said applicants proceeding in the Exchequer Court of Canada for a Declaration as to whether or not the said 1,534,000 florins Royal Dutch Company capital stock held by the Royal Bank of Canada, Montreal, for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, have been at any time on and since the 2nd day of September, 1939, subject to the Consolidated Regulations Respecting Trading with the Enemy (1939).

This action was then brought. The statement of claim contains 34 paragraphs, most of which were objected to by counsel for the defendant on the hearing of this motion, as being irrelevant and embarrassing. It is not necessary to set out the specific allegations to which objection was taken, since the objection was really of a general nature and affected classes or groups of allegations.

The statement of claim puts forward two main contentions; firstly, that the securities in question never belonged to an enemy and were never physically located in enemy or proscribed territory, that the plaintiffs were never enemies, that the property in question was never enemy property or held by or for an enemy and that consequently it is not subject to the Consolidated Regulations Respecting Trading with the Enemy (1939) at all, and secondly, that the property never vested in the Custodian, was never investigated by him within the meaning of the Regulations and that he is not entitled to charge any commission on its value.

In support of these contentions the statement of claim contains allegations with reference to such matters as the organization of N. V. Commissie en Handelsbank, the ownership and location of its capital stock, the place of business of the company and the residence of its directors, the nature of the company's business and its location, the ownership of the shares in question by the plaintiffs, the circumstances surrounding the holding of the shares for the plaintiffs and their deposit with the Royal Bank of

Canada, the place of residence and status of the plaintiffs, the steps taken by the Royal Bank with regard to the shares, the circumstances surrounding the application made by the plaintiffs for the release of the securities, the actions of the Custodian with regard to the application and the conditional release of the securities.

In the consent given by the Custodian there are a number of recitals including statements that under the Consolidated Regulations Respecting Trading with the Enemy (1939) the Royal Bank of Canada duly reported to the Custodian that it was holding the capital stock in question for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, and that the Custodian in consequence of the plaintiff's application and the Bank's report made an investigation and following upon the said investigation was prepared to release control of the said capital stock on payment of a commission of 2 per cent. on its value.

It would appear that the Custodian based his right to such a commission on the provisions of section 44 of the Regulations, subsection 1 of which reads as follows:

> 44 (1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.

The plaintiffs contest the right of the Custodian to charge any commission.

The purpose of this action is to obtain a declaration from the Court as to the Custodian's right to charge the commission. If the Regulations do not apply at all, as the plaintiffs contend, then the Custodian cannot avail himself of section 44 of the Regulations; if on the other hand, the Regulations do apply, it remains for determination whether the facts come under the provisions of section 44 and give the Custodian the right to impose a commission as a condition of his release of the securities.

Counsel for the defendant referred to several sections of the Regulations including section 44, and contended that the plaintiffs' action must be confined within the four corners of the consent given by the Custodian and

1942

BARON EDOUARD DE ROTHSCHILD ET AL. v. CUSTODIAN OF ENEMY PROPERTY

Thorson J.

that the plaintiffs had wandered beyond the terms of the consent. It was urged that there was a duty cast upon the Royal Bank of Canada to report to the Custodian that it held the capital stock in question for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, and that as soon as such report was made by them to the Custodian, there was a duty cast upon the Custodian to make an investigation when an application was made for the release of the property in question. It was contended that it was a matter of indifference as to who owned the shares, that the ownership of the shares, asserted by the plaintiffs, was not in issue and that all the allegations relating to the ownership of the shares or the relationship between the plaintiffs and N. V. Commissie en Handelsbank or the status of either were inconsistent with the consent and irrelevant and embarrassing.

Counsel for the plaintiffs in reply contended that the plaintiffs were not bound by the preamble to the consent and were entitled to allege any facts relating to any element as to the ownership of the shares with a view to shewing that there was no enemy ownership or property in the shares in question and that consequently they were not subject to the Regulations at all.

To order the pleadings to which objection has been taken to be struck out, at this stage, would involve a disposition of some of the issues in this action on an interlocutory application, contrary to the intent of the rule under which the application is made and the purposes which the rule was intended to serve.

While Exchequer Court Rule 114 provides that the Court or a Judge may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action, such an order should not be made unless the matter complained of is clearly impertinent or irrelevant or is clearly a breach of the rules of pleading.

It seems clear from the authorities that although the language of the rule is very wide its application should be restricted to clear breaches of the rules of pleading

and that great care should be taken to avoid a determination on an interlocutory application, of issues, which ought to be dealt with on the hearing of the action.

In *Knowles* v. *Roberts* (1), Bowen, L.J. said:

> It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right.

Odgers on Pleading and Practice, 12th Ed., at p. 155, commenting upon the corresponding English Rule, Order XIX r. 27, says:

> But it is not easy to obtain an order under this rule. One party has no right to dictate to the other how he shall plead.

This statement of the practice in applying the rule was quoted with approval by Middleton J.A. in *Canada Starch Co. Ltd.* v. *St. Lawrence Starch Co. Ltd.* (2)

The jurisdiction to strike out pleadings as irrelevant should be exercised only in plain cases, such as where the matter complained of is utterly irrelevant—*Tomkinson* v. *The South Eastern Railway Co.* (3).

Impertinent matter in a pleading is such matter as is not pertinent to the questions in issue and can have no bearing upon them. If a pleading is so impertinent as to be embarrassing within the rule it may be struck out. Matter ought not, however, at the commencement of a suit to be treated as impertinent which may at the hearing be found relevant—*Reeves* v. *Baker* (4). In that case the Master of the Rolls, at p. 449, said:

> the Court ought not, at the commencement of a suit, to treat as impertinent matter that which at the hearing may be found to be relevant.

and

> I conceive that in a case where there are questions of a doubtful nature, I am not bound to hold passages impertinent, unless they clearly appear to be so, with reference to the ultimate result of the suit. If, however, they are clearly impertinent, the Court is bound to strike them out at once, but if it be doubtful, they must be left for further consideration.

(1) (1888) 38 Ch. D. 263 at 270.
(2) (1936) O.R. 261 at p. 279.
(3) (1887) 57 L.T. 358.
(4) (1851) 13 Beav. 436.

1942

BARON EDOUARD DE ROTHSCHILD ET AL. v. CUSTODIAN OF ENEMY PROPERTY

Thorson J.

The same Master of the Rolls (Lord Longdale) in a previous case, *The Attorney General* v. *Rickards* (1), held that exceptions for impertinence cannot be maintained, if the materiality of the passages is so connected with the merits of the cause as to render it proper matter for discussion and for the determination of the Court at the hearing. At p. 449, he said:

> Those who are acquainted . . . . with the real difficulty there often is in ascertaining whether an allegation is material or not would not, in the least degree be disposed to concur in the opinion that because a fact may, at the hearing or at the end of a cause, turn out to be immaterial, it is therefore to be treated as impertinent from the beginning.

and at p. 450:

> The Court cannot go into all the merits of a case and consider what the ultimate rights of a plaintiff may be, for the purpose of determining, . . . whether certain allegations, the materiality of which may be doubtful, are actually to be considered as immaterial. It would have the effect of drawing the whole merits of a cause into question, upon an allegation of impertinence.

He also at p. 450, made the following statement as to the principles that should govern matters of this kind.

> It is a matter of importance to avoid unnecessary length; but it is of much more importance, in discussing a question of length or materiality, not to determine the merits, before the court has before it all that is material to the merits.

A restricted meaning has been given to the term "embarrassing" as applied to pleadings. In *City of London* v. *Horner* (2) Pickford, L.J., at page 514, said:

> I take "embarrassing" to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence on that ground, it seems to me that their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence.

The limits of the rule have been stated in a great many cases. In *Duryea* v. *Kaufman* (3), Riddell J., at page 168, put the limits as follows:

> No pleading can be said to be embarrassing if it allege only facts which may be proved . . . . . But no pleading should set out a fact which would not be allowed to be proved—that is embarrassing.
>
> Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Any-

(1) (1843) 6 Beav. 444.
(2) (1914) 111 L.T. 512.
(3) (1910) 21 O.L.R. 161.

thing which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded—but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result.

From this review of the authorities, it seems clear that effect should not be given, on this motion, to the main arguments of counsel for the defendant. To do so would be to deprive the plaintiffs of one of their main contentions, and would at the same time be a decision in advance that the shares in question are subject to the Regulations.

Since the purpose of the action is to have a declaration of the Court as to whether or not the shares in question are subject to the Regulations, the plaintiffs must be left free to make their contention that they are not subject to the Regulations at all.

Section 27 of the Regulations which provides for the consent of the Custodian that a claimant may proceed in the Exchequer Court for a declaration as to whether or not the property in question is subject to the Regulations contemplates that there may be circumstances under which the property in dispute may not be subject to the Regulations.

The operative part of the consent does not restrict the plaintiffs to the sole issue as to whether or not there has been an investigation within the meaning of the Regulations, but allows a determination of the whole question as to whether or not the shares in question are subject to the Regulations at all. Since this is so, effect cannot, on this motion, be given to the argument that the case must be confined to the issue as to whether an investigation was made within the meaning of the Regulations for this would be a determination in advance that the shares are subject to some of the Regulations, such as for example, section 44. A decision of this sort is not contemplated on an interlocutory motion of this sort. Disputed issues of law are not to be tried on a motion under this rule.

The plaintiffs must be left free to show what reasons they can in support of their contention that the Regulations do not apply to the shares in question at all, and to allege whatever facts may be necessary to support such

1942

BARON EDOUARD DE ROTHSCHILD ET AL. v. CUSTODIAN OF ENEMY PROPERTY

Thorson J.

contention. Whether such reasons are sound in law or not is a matter which should not be determined upon an application of this nature. The plaintiffs allege, for example, that they are the real owners of the shares, that they are not enemies within the meaning of the Regulations, that N.V. Commissie en Handelsbank was not an enemy, and that all other persons having any connection whatever with the shares were not enemies. To strike out such allegations, at the outset of the action would be to deprive the plaintiffs of proof essential to one of their main contentions. I express no opinion as to whether this contention of the plaintiffs even if the facts alleged in support of it are proved, is sound in law or not. It is sufficient to say that the allegations made in support of it are not so utterly or clearly impertinent or irrelevant as to warrant their being summarily struck out on this application. It should be left to the Court to determine at the hearing of the action the validity of the contentions made by he plaintiffs, when all the facts that may be material will be before the Court.

There are, however, some allegations in the statement of claim which ought to be struck out. The allegations in paragraph 19, relating to the delivery of certain shares to Baron Robert de Rothschild, a cousin of the plaintiff, Baron Edouard de Rothschild, and all the allegations in paragraph 20, since they relate to a different transaction from the one in question in this action are so utterly and clearly impertinent and irrelevant that they cannot be allowed to stand. This was admitted on the argument of the motion by counsel for the plaintiffs.

Similarly, although a paragraph in a prayer is rarely struck out on an application of this kind—*Harcourt* v. *Solloway Mills & Co. Ltd.* (1), paragraph A of the prayer asking for a declaration that the plaintiffs are and were the real and beneficial owners of the shares in question in certain proportions should be struck out as being a prayer for a declaration clearly outside the terms of the consent, and one which the Court is not required to make in these proceedings.

In paragraph 15 the words "as a matter of routine" will be struck out, as agreed.

(1) (1931) 40 O.W.N. 214.

In paragraph 22 the words "the aforesaid persons" will be struck out and the words "the plaintiffs" substituted, for purposes of clarity.

The application is therefore granted only in respect of the specific allegations in paragraphs 15, 19, 20 and 22 of the statement of claim and paragraph A of the prayer above referred to, but is otherwise dismissed.

It was also pointed out on the argument that the defendant ought to be described as the Secretary of State for Canada in his capacity as the Custodian of Enemy Property. The plaintiffs may, of course, make the necessary amendment. The plaintiffs are to file their amended statement of claim within ten days from the date hereof. The defendant will have fourteen days from the date of the filing and delivery of the statement of claim as amended within which to file his statement of defence herein.

The order will be without costs.

Order accordingly.