IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. A – 100 OF 2000

BETWEEN	ADMINISTRATOR GENERAL OF JAMAICA (Administratrix of the estate of Japheth Reid, deceased)	FIRST CLAIMANT
AND	PAULETTE MEIKLE (Sues as near relative and next of kin of Japheth Reid, deceased)	SECOND CLAIMANT
AND	DIONE REID (Sues as near relative and next of kin of Japheth Reid, deceased)	THIRD CLAIMANT
AND	VICTOR REID (Sues as near relative and next of kin of Japheth Reid, deceased)	FOURTH CLAIMANT
AND	METROPOLITAN PARKS AND MARKET LTD	FIRST DEFENDANT
AND	CLIFTON HOILET	SECOND DEFENDANT
AND	CARLTON MAIS	THIRD DEFENDANT

Ms. Marion Rose Green and Mrs. Tania Mott for Claimants

Mr. Carlton Williams for the third Defendant

Limitation of Actions

Adding Party after end of Relevant Limitation Period – CPR r. 19.4

Heard: November 7, 2008, February 6, 2009, March 3 and 31, 2009

Straw J

The applicant, Mr. Carlton Mais, (the third defendant), has applied by way of Notice of Application filed on May 13, 2008 for an order of the court to set aside an order made by the Master on

June 27, 2007, adding him as a defendant in this suit. He states that he was improperly added as a defendant after the expiration of the Statute of Limitation period.

History

The claim arose out of a motor vehicle accident that occurred on September 30, 1997. The deceased was a passenger in a vehicle owned by the first defendant and driven by the second defendant. The first defendant filed a defence on July 9, 2001 and at paragraph 4(b) denied that the second defendant was their servant and or agent and stated that he was the servant/agent of one Carlton Mais who was contracted to the first defendant for the provision of sanitary and garbage disposal services.

For reasons which remain a mystery, the claimants did nothing with this information until the Case Management Conference (CMC) date on June 27, 2007 when the above-mentioned order was made by the Master-in-Chambers. By that time the Limitation period had expired.

On November 27, 2008, this court commenced the hearing in relation to the third defendant's application. Ms. Marion Rose Green, Counsel for the claimants submitted that the application should be refused as it did not meet the requirements as set out in CPR r 11.18 (1) (2) and (3). The relevant rules are set out as follows:

> 11.18 (1) A party who was not present when an order was made may apply to set aside that order.
>
> (2) The application must be made not more than fourteen (14) days after the date on which the order was served on the applicant
>
> (3) The application to set aside the order must be supported by evidence on affidavit showing –
>
> a. a good reason for failing to attend the hearing; and
>
> b. that it is likely that had the applicant attended some other order might have been made.

Ms. Rose Green submitted that the application to set aside the order was being made, not fourteen (14) days, but almost a year after the said order was served on the applicant. She further submitted that the affidavit evidence did not accord with the conditions set out in r. 11.18(3).

The Relevant Rules

The relevant rule for consideration is not r. 11.18 (1), (2), (3) however, but r. 11.16 (1), (2) and (3).

Rule 11.16 (1), (2), (3) deal with application to set aside an order made on application without notice.

Mr. Mais, the third defendant, was never served notice of any application to add him as a defendant. There is no requirement under this rule for any affidavit evidence at all.

Rule 11.16 (2) does, however, require that the application must be made not more than 14 days after the date of service of the order. This was obviously not the case.

In applying the overriding objectives of the CPR as contained in rule 1.1, the court instructed the parties to do further submissions in relation to rule 19.4 as the third defendant could not be barred from applying a statutory defence at any time during the proceedings.

The issue has to be decided upon the application of the facts to CPR 19.4, (1), (2) and (3) as these provisions permit the addition or substitution of a party after the relevant limitation period has expired if certain conditions have been satisfied.

Mr. Carlton Williams, Counsel for the third defendant, thereafter took the opportunity to file Amended Notice of Application on March 2, 2009. The Amended Notice is similar to the original except that it makes an added request for Mr. Mais to be dismissed from the suit as the claimants are statute barred in respect of the incident giving rise to the claim. CPR 19.4 (1), (2) and (3) are set out as follows:

CPR r. 19.4 (1), (2) and (3)

19.4 (1) This rule applies to a change of parties after the end of the relevant limitation period.

(2) The court may add or substitute a party only if –

a. the relevant limitation period was current when the proceedings were started; and

b. the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that –

a. the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

b. the interest or liability of the former party has passed to the new party; or

c. the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant.

The claimant having already satisfied the condition stated by r 19.4 (2) (a), has now to satisfy the condition listed at r 19.4 (2) (b) i.e. that the addition or substitution is necessary.

Rule 19.4 (3) (a), (b) and (c) lists alternative provisions to be satisfied in order for the addition or substitution to be deemed necessary.

In relation to the present case, neither the condition listed at r 19.4 (3) (a) or (b) are relevant. There are no issues of mistake to be considered. The central issue for determination is the provision listed at (c) i.e. whether the addition of Mr. Mais is necessary for the claim to be properly carried on against the existing parties.

Submissions and Reasons for Judgment

Mr. Williams submitted that there is nothing to prevent the claimant proceeding with the case against the first and second defendants.

He cited the case of **Martin v Kaisary** 2005 EWCA CIV 594 where the equivalent English provisions, CPR r 19.5 (3) (b) were discussed. The English CPR, pt. 19 makes provisions for changes in the parties to an action after the action has began. Rule 19.5 makes provisions for the addition or substitution of a party after the end of a relevant limitation period. This rule was made pursuant to the provisions of Section 35 of the Limitation Act 1980. We have no such equivalent Act in this jurisdiction. However, the wording of CPR 19.5 subrule (2) and (3) is similar to a great extent, to CPR (Ja) r 19.4 (2) and (3).

The relevant English rules are set out as follows.

CPR 19.5 sub-rule (1) provides:

"This rule applies to a change of parties after the end of a period of limitation under –

(a) the Limitation Act 1980 …."

Sub-rule (2) provides:

"The court may add or substitute a party only if –

(a) the relevant limitation period was current when the proceedings were started; and

(b) the addition or substitution is necessary."

Sub-rule (3) provides, so far as is relevant:

"The addition or substitution of a party is necessary only if the court is satisfied that –

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) The claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant.

In **Martin v Kaisary** (supra), the decision of the court was based upon the application of the facts to CPR 19.5 (2) and (3) (b), which are the equivalent provisions in relation to the present case.

In relation to these provisions, Smith L J stated as follows (at page 5):

> *"They allow a party to be brought into an action but deprive him of an accrued limitation defence. The potential for injustice must be borne in mind when interpreting the rule itself and when exercising the discretion to allow addition or substitution."*

In the present case, the addition has already been allowed. This court cannot say whether the Master exercised herself in relation to the issue of the limitation defence. In any event, this court is considering whether there is any good reason that Mr. Mais should continue to be deprived of his limitation defence.

In **Martin** (supra), the Court of Appeal held that the joinder of a new defendant was not permitted as it was not necessary to establish the liability of the original defendant.

Is the joinder of the third defendant necessary?

In **Blackstone's Civil Practice** 2008, (edited by Stuart Sime & Derek French, Oxford University Press), the authors discuss CPR r 19.5 (3), (b) at paragraph 14.10. The authors discuss the operation of the equivalent provision in the old rules CRSC, ord. 15 r 6(6) and state that its operation was limited to five categories of cases in which, for technical reasons, claims were liable to be defeated for want of the correct parties. These are listed as follows:

1. The claim concerned property vested in the new party at law or in equity and the claimant had an equitable interest in the property.

2. The claim was vested in the claimant and new party jointly but not severally.

3. The new party was the Attorney General and the proceedings should have been brought as relator proceedings in his name.

4. The new party was a company in which the claimant was a shareholder whose claim was liable to be defeated by the rule in **Foss v Harbottle** (1843) 2 Hare 461.

5. The claim should have been brought against new party and the existing defendant jointly.

In **Kaisary** (supra) Brooke L J (at page 7) discusses the rationale behind these categories. He said they were established by the 21st report of the Law Reform Committee (Final Report on Limitation of Actions) (1977) (mnd 6923). He states as follows (para. 26, pg. 7):

> *"The first four of these examples were cases where the plaintiff's mistake relates to his position as plaintiff. It was only in the last situation that the committee felt that the rules ought to permit the joinder of a new person as a defendant. It felt that in the case of joint obligations, a plaintiff who started proceedings against some, though not all, of the persons jointly liable had in fact enabled those on the 'other side' to know that the proceedings were aimed at them."*

Of course, the power to make CPR 19.5 (3) (b) is to be found in Section 35 (4), (5) (b) and (6) of the Limitation Act of 1980 and flowed out of the Law Reform Committee (Final Report on Limitation of Actions). Although, we have no such law as was stated earlier, is there any basis for allowing a wider interpretation to the effect of CPR (JA) r 19.4 (3) (c).

If the second defendant is found to be the servant or agent of Mr. Mais, Mr. Mais would in fact be vicariously liable for the second defendant's action. Both Mr. Mais and the second defendant would be jointly and severally liable. The addition of Mr. Mais is not necessary in order to continue or prove the action against either the first or second defendant.

In **Merrett v. Babb** (2001) EWCA CIV 214; (2001) QB 1174, permission to add the claimant's mother as second claimant was granted after the expiry of the limitation period on the ground that the cause of action was vested in them jointly, so the claim could not be maintained by the original claimant without joining her mother.

The failure to join Mr. Mais would not mean that liability could not be enforced at all against any of the existing parties. If the claimants fail to prove that the first defendant is vicariously liable for the acts of the second defendant but that the second defendant is liable they may encounter serious difficulties in recovering any monetary compensation.

As tragic as this may be, this economic factor cannot be a proper basis to strip Mr. Mais of his statutory defence. I am fortified in this view by the fact that the claimants knew of the assertion of the first defendant from as far back as 2001 and failed to take timely action.

The Amended Notice of Application filed on March 2, 2009 is therefore granted in terms of paragraphs 3 and 4.