C. f. PLEADINGS — Preliminary objection — No cause of Action disclosed — Application for dismissal of action or striking out St of Claim — s. 33 Constabulary Force Act.

Judge hears St of Claim — Effect to deprive defendant of defence under Statute of limitation. Pleadings should have been amended Weldon v Neal and Chadwick v Reid considered.

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 39/86

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	-	THE ATTORNEY GENERAL SPL. CONS. ANTHONY COWELL	- DEFENDANTS/ APPELLANTS
AND	-	ANTHONY RICHARDS	- PLAINTIFF/ RESPONDENT

R.G. Langrin, Q.C., and Wendell Wilkins for appellant.

Sylvester Morris for respondent.

February 19, &
9th March, 1987

ROWE, P.:

No one applied for an amendment to the writ or the statement of claim in suit C.L. 1979/R201 but Patterson J. basing himself upon the dictum of Bowen L.J. in Cropper v. Smith, [1884] 26 Ch.D. 700 at pp. 710-711, exercised his discretion to amend the statement of claim to cure what he had earlier found to be a fatal omission from the pleadings. The defendants/appellants promptly sought and obtained leave to appeal. After hearing counsel on both sides we allowed

the appeal, set aside the order in the court below and entered judgment for the appellants with costs against the respondent to be agreed or taxed. These are the reasons for allowing the appeal.

Special Constable Cowell, in December 1977, arrested and charged the respondent for larceny in connection with the theft of motor car NC 5186 and in the process he seized motor car NC 0678 which the respondent had been driving. The respondent was acquitted of the charge in June 1978. There was an allegation that some of the parts on motor car NC 0678 had been taken from motor car NC 5186 and as the court made no order for the disposal of the motor car NC 0678, that motor car was not re-delivered to the respondent. He took action. The endorsement to his writ dated December 5, 1979, is in these terms:

> "The Plaintiff claim is for Dentinue and or for conversion. The Defendant wrongfully detained and detains from the Plaintiff, the Plaintiff's goods and chattels that is to say a motor car bearing registered No. NC 0678, and registered book. Despite repeated requests the Defendants have refused to return same.
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> The Plaintiff claims a return of the said goods and chattels or their value and damages for their detention. The first-named Defendant who is a Police Officer was at the time acting as the servant and or agent of the second-named Defendant who is joined as a Defendant by virtue of the provision of S14 (2) of Law 28 of 1958 of the Crown Proceedings Law."

Paragraphs 2, 3, 4, and 5 of the statement of claim filed and served on December 14, 1979 are in these terms:

> "2. The first-named Defendant is a Policeman and the servant or agent of the second-named Defendant, and at the relevant time was acting as the servant or agent of the 2nd named Defendant.
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> 3. The first-named Defendant wrongfully continues to detain from the Plaintiff the Plaintiff's goods and chattels that is to say a mini motor car bearing registered No. NC 0678 and its registration booklet.

> "4. The said motor car was at the date of filing of this Writ on the compound of the Half Way Tree police station, Saint Andrew.
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> 5. The Plaintiff has orally and in writing demanded the said goods of the Defendants but the first-named Defendant refused to deliver them up to the Plaintiff and thereby converted the same to his own use, and wrongfully deprived the Plaintiff of same."

A defence was put in on April 23, 1980, and in it the appellants pleaded that the detention of the motor car NC 0678 and the registration booklet therefor was not done maliciously or without reasonable or probable cause. The defence also relied upon the statute of limitations applicable to such matters, viz., section 2(1) of the Public Authorities Protection Act.

At the commencement of the trial on February 10,1986, counsel for the defendants sought and obtained leave of the Court to raise a question of law as a preliminary issue, that the writ, its endorsement and the statement of claim disclose no cause of action by virtue of the provisions of section 33 of the Constabulary Force Act, the consequence of which would be the striking out of the statement of claim and dismissal of the action. The learned trial judge declined to do either, but instead ordered that the statement of claim be amended.

In support of his contention that the statement of claim disclosed no cause of action, Mr. Langrin submitted to us that the provisions of section 33 of the Constabulary Force are mandatory and must be complied with. Unlike actions against private persons, when one attempts to sue a constable for an act or omission in the execution of his duty, one must both allege and prove that the act or omission was done maliciously or without reasonable or probable cause. Section 33 reads:

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

The learned trial judge did not dissent from the view expressed by Mr. Langrin at trial, and he specifically found as follows:

> "I hold that the plaintiff's pleadings are bad, and that the plaintiff may only proceed with this action if the statement of claim is amended."

This finding was not challenged on appeal. Before us, as it was before Patterson J. then, the sole question was whether it was possible in law for the statement of claim to be amended on February 10. 1986. Patterson J. accepted the authority of Weldon v. Neal [1887] 19 Q.B.D. 394 and the dictum of Esher M.R. at 395, but he did not follow that authority. All the three judgments in Weldon v. Neal are important and I set them out hereunder:

> "LORD ESHER, M.R.: We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.
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> This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule. For these reasons I think the order of the Divisional Court was right and should be affirmed."

"LINDLEY, L.J.: I am of the same opinion. I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations."

"LOPES, L.J.: I am of the same opinion. I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, viz., that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side. But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant.

"I think the appeal should be dismissed."

Patterson J. did not make the attempt to identify any peculiar circumstances in the instant case beyond saying that the defence had pleaded that the acts of Spl. Cons. Cowell were neither malicious nor done without reasonable and probable cause. But he did find that it must have been apparent to the plaintiff long before the trial that an amendment was necessary and yet the plaintiff took no step in that direction.

Section 2 (1)(a) of the Public Authorities Protection Act provides that where any action is commenced against a person for any act done in execution of any law or any public duty, the action shall not lie or be instituted unless it is commenced within one year next after the act. What is the date of the offending act of which complaint is made? Mr. Morris said that that date can only be ascertained when the evidence is led at trial, because it might then be shown that the latest date of demand and refusal was within rather than outside the statute.

Mr. Langrin would have none of that. He submitted, and we think quite correctly, that the trial judge was bound by the state of facts as set out in the pleadings. What the respondent said in his statement of claim was that the appellants had detained his motor car and registration booklet, specifically that the plaintiff had orally and in writing demanded the return of the said goods, and that the defendant Cowell had refused to deliver up the articles. That demand and refusal must have preceded the filing of the writ, otherwise there could have been no cause of action. Evidence can be led at trial only in support of an allegation of fact in the pleadings and anything that occurred after the filing of the writ would require, not an amendment to the original writ, but rather a new writ entirely. In our view, the date of the act complained of was prior to December 5, 1979.

The learned trial judge drew attention to a decision of the former Court of Appeal in Jamaica given in 1960 in the case of Charlton v. Reid, [1960] 3 W.I.R. 33. The headnote of that case reads in part:

> "The appellant, a police constable, seized the respondent's motor van, a public passenger vehicle licensed as a contract carriage, on the ground that it was plying for hire otherwise than as a contract carriage. The respondent was charged under s.52 (2) of the Road Traffic Law, Cap. 346 [J.], and acquitted at his trial, whereupon the van was returned to him. The respondent then sued the appellant for damages for illegal seizure and detention of his van. He did not aver in his particulars of claim that the appellant had acted without reasonable and probable cause but at the trial leave to amend was granted by the resident magistrate although objected to on the ground that more than six months had expired since the seizure and that the effect of permitting the amendment would be to revive an action which was statute barred."

In holding that it was wrong to permit an amendment, the effect of which is to deprive a defendant of a legal defence otherwise available to him, McGregor C.J. said:

> "We wish to deal first with the principles which will govern a court when an application is made to amend a claim against a person who is entitled to the benefits of the Public Authorities Protection Law, Cap. 316 [J.]. There is an abundance of authority that the court has always refused to allow a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. We refer only to Weldon v. Neal (2), Hall v. Meyrick (3), Mabro v. Eagle, Star and British Dominions Insurance Co.,Ltd. (4), and among the many Jamaican cases to Fletcher v. Wright & Others (5) and Clunis v. Johnson & Another (6).
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> "Section 2 (1)(a) of the Public Authorities Protection Law, Cap. 316 [J.], provides that where any action is commenced against any person for an act done in pursuance or execution or intended execution of any Law, the action shall not lie or be instituted unless it is commenced within six months after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof.
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> "Section 39 of the Constabulary Force Law, Cap. 72 [J.], provides that it shall be expressly alleged in the declaration in every action brought against any constable for any act done by him in the execution of his office, that such act was done either maliciously or without reasonable or probable cause, and that if the plaintiff fail to prove such allegation his action shall fail. The plaintiff having failed to plead malice or absence of reasonable and probable cause, sought leave to amend his particulars on the opening day of the trial, which application as already stated was granted."

When this case was appealed further to the Federal Supreme Court, the decision was upheld. Within the experience of all the members of this Court Charlton v. Reid has been accepted and followed systematically for the past 27 years. Patterson J. gave no reason for departing from this

authoritative decision except to say that his attention had not been directed in the instant case to any prejudice or injustice which the appellants would suffer if the amendment was granted. The statutes of limitations provide legal defences and so we would ask what greater injustice could be done to a defendant than to find himself liable to defend a suit which is brought or continued contrary to the prevailing statute of limitation?

Anything that Bowen L.J. says is worthy of the greatest judicial respect. However, his dissenting opinion in Cropper v. Smith, supra, ought not to be used by a trial judge to put on one side as worthless the clear and precise limitations contained in the Public Authorities Protection Act.