JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 69/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	AUBURN COURT LIMITED	APPELLANT
A N D	JAMAICA CITIZENS BANK LIMITED	RESPONDENT

Berthan Macaulay Q.C., instructed by Rudolph Francis for Appellant

Michael Hylton and Miss Minett Palmer instructed by Myers, Fletcher & Gordon for respondent

November 27 and December 20, 1990

ROWE P.:

On November 20, 1985 a specially endorsed Writ was filed in the Supreme Court by the respondent against four defendants including Auburn Limited, as first defendant, claiming the sum of $4,723,866.74 and interest thereon. Attorney-at-Law Trevor Levy entered appearance on behalf of all the defendants on December 11, 1985 and on January 15, 1986 judgment was entered against all four defendants in default of defence. Then on September 28, 1987 the Master ordered that the Writ of Summons be amended by deleting the name "Auburn Limited" and substituting therefor "Auburn Court Limited". Thereafter nothing was done either to amend the Writ or any of the subsequent proceedings. In April 1990 the appellant filed a Motion to set aside the default judgment, which Walker J., after a lengthy hearing,

dismissed with costs to the respondent. It is from the dismissal of the Motion that this appeal is taken.

The main ground of appeal argued by Mr. Macaulay was that the Writ of Summons was not amended within fourteen days from the date of the Order granting the amendment or at all pursuant to Section 265 of the Judicature (Civil Procedure Code) Law, (the Code) and the amendment was therefore rendered null and void.

Title 27 of the Code is entitled "Amendment". Section 259 entitles the Court or a Judge to allow either party to amend his "endorsement or pleadings". Section 260 deals with the circumstances in which a plaintiff may amend his "Statement of Claim" without leave; Section 261 enables a defendant to amend his "counter-claim or set-off" without leave in certain circumstances; Section 263 provides the opportunity for the opposite party to plead to the amended endorsement or pleadings covered by Sections 260 and 261. Then Section 264 makes provision for amendment at trial. Section 265 is in these terms:

> "If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become 'ipso facto' void, unless the time is extended by the Court or a Judge".

Section 266 describes the manner in which an amendment to "an endorsement or pleading" must be made.

Although "pleading" is defined to include any petition or summons, in the context of Title 27 that term cannot extend to the formal parts of a Writ. All the sections of the Code in Title 27 make it clear that only endorsements on the Writ fall to be determined under that Title. Were it otherwise, one would have expected to find specific reference to "Writ" in Sections 260, 261, and 266 of the Code. Mr. Hylton submitted that the Code deals with the amendment to a Writ in Section 677 which provides that:

> "The Court may order or allow any amendment of any writ, petition, answer, notice, or other document whatever, at any time on such terms as justice requires".

In my view the power to amend under Section 677 is entirely independent of the powers conferred by Sections 260-271. The sanction provided by Section 265 refers to amendments ordered under Title 27 and has no relevance to amendments ordered pursuant to Section 677. Consequently the failure by the respondent to amend the Writ within fourteen days of the Master's Order does not render the amendment void ipso facto.

Mr. Macaulay's second main submission was that the Writ was issued against a non-existent entity and was therefore null and void notwithstanding purported service thereof upon the non-existent entity and the entry of appearance on behalf of that non-existent entity. For the respondent it was argued that the Writ was issued against an existing legal entity but due to inadvertence it was mis-named. In my view Walker J. applied the correct test in determining the issue whether or not the description of the first defendant on the Writ as "Auburn Limited" could be regarded as a mere misnomer. He said:

> "As I have said before it is not in dispute that at the date of issue of the writ the applicant was an existing juristic person. There was no such entity as fitted the description of Auburn Limited at that time. I have no doubt that at the time of personal service of the writ upon the third defendant, the third defendant, who was then a director of the applicant, knew perfectly well that it was the applicant that the plaintiff intended to sue, and that it had merely got the name wrong. Furthermore, the third defendant must have been well aware of the applicant's indebtedness to the plaintiff. Significantly, that indebtedness has never been denied. Indeed, it has been affirmed by payments on account made by the applicant since the plaintiff's judgment was obtained. Significantly, too, appearance was entered on behalf of <u>all</u> the defendants named in the plaintiff's writ on the day after personal service of the writ upon the third defendant. ..... In the result, I have concluded that the present case is one of mere misdescription or misnomer which does not invalidate the writ".

In making these findings and coming to his conclusion, Walker J. based himself squarely upon the reasonable reader test propounded by Devlin L.J. in <u>Davies v. Elsby Brothers, Ltd.</u> [1960] 3 All E.R. 672. There the plaintiff brought an action against his employers describing them in his Writ as "Elsby Brothers (a firm)". He later discovered that the partnership had been changed into a limited liability company, but made the discovery too late to amend his Writ before the expiration of the relevant statute of limitations. If the description was a mere misnomer, it could be corrected, but if it amounted to the addition of a new party, the Court would not be prepared to make the amendment which would deprive the defendant of a good defence under the limitation statute.

Devlin L.J. adumbrated a test which he regarded as of general application by which a Court can be guided in determining the question: Is the mis-description a mere misnomer or is it not? He said at page 676 of the Report:

> "It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. ..... In English law as a general principle, the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases of misnomer - which may embrace a number of other situations apart from misnome on a writ, for example, mistake as to identity in the making of a contract. The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make enquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer".

I entirely agree with the conclusion of Walker J. that a reasonable reader in the position of the responsible officers of the appellant company would have absolutely no doubt that the Writ was intended for the appellant company but that there was error in stating the appellant's name.

The amended Writ was not served upon the appellant. In Paxton v. Baird [1893] 1 Q.B.D. 139, the English Court of Appeal held that where there was unconditional appearance to a Writ which was afterwards amended in a technical sense, that appearance stood and it was unnecessary for further appearance to be entered before judgment could be entered. In that case the Writ was generally indorsed and appearance entered. On an attempt by the plaintiff to obtain summary judgment under the Rule governing specially indorsed Writs, the defendant obtained unconditional leave to defend. Then the plaintiff, with the leave of the Master, amended his Writ to turn it into a specially indorsed Writ and on this amended Writ sought summary judgment. In giving leave to amend the Master ordered that the appearance entered therein do stand as an appearance to the Writ as amended. Of this further Order, Wills J. commented:

> "That part of the master's order, which directed the appearance already entered to stand as an appearance to the amended writ, seems to me unnecessary and inoperative, as the appearance when once entered stands, and there is no need for a fresh appearance to a writ when it has been amended".

No effort has been made by the appellant to withdraw the unconditional appearance entered on its behalf by its Attorney-at-Law Trevor Levy, and it therefore stands as the appearance to the Writ as amended.

One of the appellant's minor complaints was that Walker J. took into account an irrelevant matter, viz., that the appellant never denied the debt to the respondent and was influenced thereby. If the tribunal of fact was called upon to exercise a discretion then it would be entitled to consider the merits of the case. However in the

instant appeal all the issues raised involved questions of law in the resolution of which Walker J. was not required to exercise any modicum of discretion.

In my view there is no merit in any of the grounds filed and argued on behalf of the appellant and accordingly I would dismiss the appeal.

MORGAN J.A.:

I agree.

GORDON J.A. (AG.):

I agree.