NMC

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C L 1996 B 110

BETWEEN	RAMON BARTON (an infant by his father and next friend Wilburn Barton)	CLAIMANT
AND	WILBURN BARTON	2nd CLAIMANT
AND	JOHN McADAM	1st DEFENDANT
AND	WESLEY McADAM	2nd DEFENDANT
AND	LAWRENCE DENNIS	3rd DEFENDANT
AND	DENNIS CLINTON WRIGHT	4th DEFENDANT

Miss Suzette Wolfe instructed By Crafton Miller & Company for Claimants

Mr. Emile Leiba instructed by Piper & Samuda for 3rd and 4th Defendants

Heard: January 19, March 7 and May 24, 2005

Sinclair-Haynes, J. (Ag.)

On January 11, 1993 whilst Lawrence Dennis was driving a bus, it collided with a vehicle driven by John McAdam. Ramon Barton, who was a passenger in the bus driven by Lawrence Dennis, sustained serious injuries. At the time, he was nine years old. He is now 20 years old. His father and next friend Wilburn Barton instituted proceedings against the driver and Mr. Clinton Wright whom he sued as principal and owner of the said bus.

On December 12, 2003, the claimants' attorney applied to the court for permission to substitute Wright's Motor Service Limited (Wright's) as the owner of the vehicle in which the claimant was a passenger and for leave to amend the Writ of Summons and Statement of Claim. The application was sought on the ground that the claimant, at the time of instituting the proceedings, believed that Mr. Clinton Wright was the owner of the bus when in fact it was Wright's Motor Service Limited. The 3rd and 4th defendants have objected to the application.

Averments of Mr. Samuda in opposition to the application on behalf of the third and fourth defendants

Mr. Christopher Samuda deposed in an affidavit dated April 26, 2004 as follows:

(1) In the defence filed on behalf of the 3rd and 4th defendants no admission with regards to the ownership of the vehicle was made. The claimant in his reply insisted that the 1st defendant was the owner of the vehicle. Reasonable investigations conducted would have revealed the identity of the true owner.

(2) Prejudice will be done to Wright's if the orders sought are granted because the accident occurred over 11 years ago.

(3) The 4th defendant and the party to be substituted are different legal personalities and therefore cannot fall under the definition of a mistake as stated in part 19.4 of the C P R 2002.

(4) The interest or liability of the 4th defendant has not passed to the party to be substituted as no liability ever resided with the 4th defendant, as he was not the owner of the said motor vehicle at the material time.

(5) The matter can properly be carried on against the existing parties without Wright's Motor Services Limited being substituted for the 4th defendant as the claimant can still proceed against the 1st, 2nd and 3rd defendants.

Submission by Miss Suzette Wolfe

Miss Wolfe contends that the fact that the parties are in law separate persons does not prevent the application from falling within rule 19.4. It is clear that the claimant intended to sue the owner of the vehicle. She relied on the cases of **International Distillers and Vinters Ltd v J F Hillebrand and Others** TLR January 25, 2000, **Rodriquez v R J Parker** (1966) 3WLR 546 and **Evans Ltd. Carrington and Co. Ltd.** (1983) 1 QBD 810 in support of her contention.

Further, she submitted that the mistake was a genuine one, which could not have misled the defendant as to whom the claimant intended to sue. In fact the claimant in a related proceeding, suit number CLM-022/98 had mistakenly sued Mr. Wright as owner of the bus. This demonstrates that as far as the public was concerned he was the person actively involved in the management of the buses and consequently the person to whom the public looked in the event of an accident. The statement of claim clearly shows that the claimant intended to sue the person who matched the description of owner of the vehicle. She relied on the case of **Horne Roberts (a child) v Smithkline Beecham Plc. and Anor.** Times Law Reports, January 10, 2002.

She further submitted that Wright's Motor Services Limited is not a large company with several subsidiaries, departments and large board of directors. It is a small family company in which the Wrights family is the shareholders. For all intents and purposes Mr. Wright could be likened to the directing mind and will of the company as it

was he the members of the public knew and regarded as owner and operator of the several buses including the bus in which the claimant was injured. Wright's Motor Services Limited would in the circumstances be aware of the claim and its details.

The court in determining whether to exercise its discretion under the Civil Procedure Rules must give effect to the overriding objective of achieving justice between the parties. It must weigh the risk of prejudice or detriment that will result to the claimant by refusing the application against that which will result to the party to be joined.

The court, she submitted, has the power to substitute a legal personality for another. She relied on the cases of **Parsons & Anor. v George & Anor.** (2004) EWCA Civ. 912.

She also submitted that although the defendants' defence contained a bare denial of ownership of the vehicle, the 1st and 2nd defendants' attorney further perpetuated the mistaken belief that Mr. Wright was the owner of the vehicle by their letter of November 12, 2000. This error was further compounded by the endorsement on the Minute Sheet in respect of the judgment entered in Suit No. C L M 022/98. The judge has since corrected the Minute Sheet. It was not until the 6th of October 2003 that the 3rd and 4th defendants' attorneys-at-law indicated by letter that the court, in Suit No. C L M 022/98 had found that Mr. Wright was not the owner of the vehicle. It was only then that the mistake became apparent.

A substitution or addition may be made after the limitation period even if such an order robs the defendant of his limitation defence. She relied on the case of **Mitchell v Harris Engineering Co. Ltd.** (1967) 2 QBD 703

Submission by Mr. Emile Leiba

He reiterated the fact that the claimant was alerted seven (7) years ago that the Mr. Wright was denying ownership.

Delay is a material consideration, which the court must take into consideration in exercising its discretion. This claimant waited six (6) years before making its application. Matters ought to be expeditiously dealt with.

Mr. Wright is now deceased and he was the principal of the company. The court has ruled that the driver was partially responsible. The company would be prejudiced in the conduct of its case by virtue of the difficulty suffered by them in raising a defence of frolic since Mr. Wright the person with the knowledge, is now dead.

The recollection of the witnesses will be in question, as a trial date will not be procured until perhaps 2007, some years after the trial of the other matters was held.

The company is now exposed to liability beyond the policy limit as the claim is brought in respect of an accident, which occurred 12 years ago. Had Wright's Motor Services Limited been substituted or joined at the commencement of the accident, it is possible that the claim could have been settled for the policy limit or a sum within a reasonable boundary of that figure. It is a risk, which the company to be substituted is exposed.

The claimant suffered serious injuries. The company will be personally exposed to liability beyond the policy limit. The company will also be exposed to interest, which has accrued as a result of the claimant's delay.

The claimant could not be relying on mistake, as he was not operating under a mistake since he was notified.

He submitted that the court in **Beverly Kesslar v Moore & Tibbits** (2004) EWCA Civ 1551 delivered November 3, 2004 placed reliance on the fact that the claimant was not notified.

The Law

Rule 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 substitute 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.

This matter was filed on the 9th April 1996 and the accident occurred on the 11th January 1993. The relevant limitation period was therefore current when the proceedings were commenced.

The contention of Mr. Samuda that it is not necessary to substitute Wright's because the claimant can proceed against the other defendants is in my view untenable. Wright's is the registered owner of the vehicle. In order to proceed against the owner of the vehicle it is necessary to substitute Wright's Motor Services Limited for the 4th named defendant although the 3rd named defendant has been found partially responsible for the collision. He may well be impecunious. Wright's Motor Services Limited, the registered owner of the bus, is insured to deal with eventualities such as this.

It is also Mr. Samuda's contention that the interest or liability of the 4th defendant has not passed to the party to be substituted as no liability ever resided with the 4th defendant, as he was not the owner of the vehicle at the relevant time.

I need not deliberate on the merits of this contention as the claimant is relying on Rule 19.4 (3) (a) and not Rule 19.4 (3) (b). With regards to Rule 19.4 (3) (a) the addition or substitution is necessary only if the court is satisfied that the party was named in the claim in mistake for the new party. A claimant is at liberty to select which sub rule to rely on.

It is now settled law that the loss of a limitation defence is not an aspect of prejudice that the court should take into consideration. Mr. Leiba rightly did not pursue that argument.

In **Mitchell v Harris Engineering Company Limited**, the plaintiff mistakenly sued H E Co. Ltd., which was a company, registered in Northern Ireland. After the limitation period had expired, the claimant became aware of the error and applied for leave to substitute H E Co. Ltd., for H E Co. (Leeds) Ltd. The substitution involved the substitution of one legal entity for another. It was held by the court of appeal that

although the writ was defective it was issued within the limitation period. The Rules conferred upon the court the discretion to allow that defect to be cured outside of the limitation period.

Lord Denning at page 718 said:

> *"Some of the judges in those cases spoke of the defendants having a "right" to the benefit of the statute of limitation and said that that "right" should not be taken away from him by amendment of the writ. But I do not think he was quite correct, the statute of limitation does not confer any right on the defendant. It only imposes a time limit on the plaintiff...there is nothing in the statute, which says that the writ must at that time, be perfect and free from defects. Even if it is defective, nevertheless the court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by the statute.'*

(See also **Sterman v E W and W J Moore Ltd**. (1970) 1 ALL ER 581)

Should such an amendment be allowed in the circumstances of the instant case?

Dyson L J in **Parson and Anor. v George and Anor.** at paragraph 9 said:

> *'...there are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after the expiry of the relevant limitation period. . A common example of such a case is where the defendant has made a genuine mistake and named the wrong defendant, and where the correct defendants have not been misled and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence).'*

The pertinent questions are:

a) Was the claimant's mistake genuine and has it misled the defendant or created doubt as to whom the claimant intended to sue?

Messrs Samuda and Leiba contend it was not genuine because the defence alerted the claimant.

(b) Does the fact that the claimant negligently and imprudently chose to ignore the denial of ownership of the vehicle by the defendant in his defence put it outside the kind of mistake envisaged by the rule?

(c) Should the court's jurisdiction extend to such situations?

In **Mitchell v Harris Engineering Co. Ltd.**, although Russell L J expressed the view that 'with a greater degree of diligence' the error would have been avoided, he opined that 'mistake' should not be construed so narrowly as to mean error without fault.

The claimant was genuinely mistaken in his belief that Mr. Wright was the owner of the buses. Indeed so was the claimant in the related matter suit no 002/98 who also impleaded by intituling Clifton Wright as a defendant instead of Wright's Motor Service Limited.

The submission that the claimant cannot substitute a legal entity for another is unsustainable. The trend of recent authority supports the proposition that the Rules permit the court to substitute one legal persona for another.

In the case of **Horne Roberts**, 2002 1 WLR 1662, the claimant intended to sue Merck and Company, the maker of a particular batch of measles vaccine but sued the firm of Smithkline Beecher because it mistakenly felt that Smithkline was the manufacturer of the vaccine. Keene L J allowed the claimant to substitute the defendant Smithkline Beecham Plc. for another entity Merck and Co. outside the limitation period. Keene L J concluded that the claimant always intended to sue the manufacturer of the vaccine and that that was sufficient to give the courts the power to substitute.

The English Court of Appeal in the case of **Beverly Kesslar v Moore & Tibbits** is also instructive.

A brief outline of the facts is helpful. The claimant felt that her attorney-at-law Miss Roughly was negligent in the manner in which she handled a conveyance and legal aspects of a property, which she purchased, and resulted in her being sued. The firm of Kundert and Company had acquired the law firm of **Beverly Kessler v Moore & Tibbits**. Miss Roughy and Mr. Kundert were partners at the time she acted for Miss Kesslar. However, they never became partners in the firm of Moore and Tibbits. The court allowed the substitution. It relied on the decisions in the cases of **Horne Roberts (a child) Smithkline Beecham Plc and Anor.,** also cited at 2002 1 WLR 1662 and **Parsons v George**.

Buxton L J relied heavily on and quoted abundantly from **Horne Roberts** which had recently been decided.

At paragraph 16 he said as follows:

' Then Keene L J went on in paragraph 39 to say this:

> *'...It is, after all, a provision, which expressly allows the substitution of a new party for the original named party. Almost by definition such substitution could be said to involve a change in the identity of the party.'*

At paragraphs 16, 17 and 18 he commented as follows:

'That case, as I say, is striking because it substitutes or joins a completely new defendant who had no connection with the party originally impleaded.
That authority of course binds us. It was considered further, however, in the case of Parsons v George, already referred to...but it is important to quote what Dyson L J said about Rule 19.5 (3)(a) generally. He said this at paragraph 41 of his judgment:

> *"The meaning of section 35(6)(a) of the1980 Act and of CPR 19.5(3)(a) was considered by this court in Horne- Roberts v Smith Kline Beecham plc... As appears from paras 40-45 of the judgment of Keene LJ, the court adopted the test suggested by Lloyd L J in The Sardinia Sulcis... to be exercised where a party has been wrongly identified, but it was possible to identify the intending claimant or intended defendant by reference to a description which was more or less specific to the particular case. Thus,*

> *for example, if it were clear that the claimant intended to sue his employer or the competent landlord, but by mistake named the wrong person, an application to substitute the person who in fact answers the description of employer or competent landlord would come within CPR 19.5(3) (a).*
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> *In other words, the court rejected the argument that CPR 19.5(3) (a) is directed only at cases of misnomer in the strict sense and adopted a more liberal approach such as that applied in Evans and Signet. That is the approach that should be adopted in the present case. The claimants always intended to sue the persons who answered the description of competent landlord, and named the defendants because they mistakenly believed that they answered that description."*

Those authorities, in my judgment, give a simple answer to the present case. Miss Kesslar and her advisers always intended to sue in respect of Miss Roughley's mistake. The error that they made was to think that that alleged negligence on Miss Roughley's part was effectively impleaded by intituling the action against Moore and Tibbits (incorporating Kundert and Co).' In my judgment it is simple and straightforward that the latter party was named in the claim in mistake for the new party, Mr. Kundert and Miss Roughley, which is now sought to be substituted for it. That really is the end of the matter."

So too, the claimant intended to sue the owner of the vehicle. Unlike the case of **Beverly Kessler v Moore & Tibbits** in which the firm sued had nothing to do with the negligence of Miss Roughley but only acquired the business, Mr. Wright was the principal director of the company the defendant now seeks to substitute. He was intimately connected with the company. He was the principal. Members of the community knew the buses as Mr. Wright's buses. The complainant in Suit No. CLM 022/98 had its claim against Mr. Wright dismissed as he had mistakenly sued him.

In **Parsons,** the claimant incorrectly named the defendants who were the executors of their former landlord as landlord. The claimant applied to the court to have the landlord, Mrs. Pamela Purcell substituted because of the mistake.

Messrs Birkett Long acted at all material times as solicitors for the defendants and Mrs. Purcell. The English Court of Appeal allowed the application.

Griffiths L J at paragraph 44 said:

> *'At all material times, Birkett Long were acting as solicitors for the defendants and Mrs. Purcell. They must have understood that the claimants were intending to apply for a new tenancy from the competent landlord, and they had named the defendants by mistake...It would be manifestly unjust to the claimants not to allow the amendment in the circumstances of this case. The claimants' error was obvious, and must have been understood by Birkett Long. Mrs. Purcell was not misled in any way and the amendment would cause her no prejudice. If the amendment is not allowed in a case such as this, it is difficult to see in what circumstances it would ever be right to exercise the power given by CPR 19.5.'*

Indeed, the defendant in the instant case Wright's Motor Services Limited is a small company whose directors and shareholders were Mr. Wright, his wife and son. He could therefore be considered to have been the 'mind and will' of the company.

According to Viscount Haldane in **Lennard's Carrying Company Limited v Asiatic Petroleum Company Ltd.**[1915] AC 705 at page 715:

> *'A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes maybe called an agent, but who is really the, directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'*

Wright's Motor Services Limited, though a registered company with separate legal personality, acted through living persons, Mr. Wright being chief of those persons. The mistake of suing Mr. Wright could not have created reasonable doubt or misled Wright's Motor Services Limited as to whom the claimant intended to sue. They clearly intended to sue the owner of the bus. Mr. Wright and the other directors must have been fully aware of the details of the claim.

Mr. Leiba submitted that in the case **Beverly Kessler v Moore & Tibbits** much emphasis had been placed on the fact that the claimant was not notified until the expiration of the limitation period.

Buxton L J who delivered the lead judgment expressed the view that if the claimant was notified of the mistake and the alleged insufficiency of claim prior to the expiration of the limitation period, the difficulty trouble and expense of the appeal would have been avoided.

However, his decision was ultimately predicated upon the reasoning enunciated in the decisions of **Horne Roberts** and **Parsons and George**.

Lord Justice Sedley L J was, however, of the opinion that the defendant had with held the information until it was too late. That was an expressed reason why he allowed the amendments. The other was that expressed by Buxton L.J.

"The critical question is; has the party to be substituted demonstrated sufficiently that it was misled and will suffer prejudice if the substitution is permitted?"

The proceedings were duly instituted within the limitation period. The defendant and Wright's Motor Services Limited had ample time to prepare their defence and could not have been misled and cannot have been prejudiced.

In Suit No. CLM-022/98, the trial judge dismissed the action against the fourth defendant. Wright's Motor Services Limited would have been placed on guard that there was likelihood that the claimants in the instant case would have made this application. At paragraph 4 of their defence, they did not expressly admit that Lawrence Dennis was acting as their servant or agent. This defence of frolic would have arisen at the earliest stage when instructions were being given to their attorneys and or insurers. Since the

circumstances under which the driver drove the vehicle would have been material. He would either have been driving with Mr. Wright or some responsible person's authority or he was on a frolic. That information would certainly have been transmitted to the insurers and or attorneys-at-law at that stage.

In **Mitchell v Harris Engineering Co. Ltd.,** both the company sued and the company substituted had common directors and a common secretary. Denning MR was of the opinion that it was a genuine mistake which the company's secretary upon reading the writ must have realized.

So too, Wright's Motor Services Limited, upon receiving the claim must have realized that the claimant intended to sue the registered owner.

It is true that the claimant has been tardy in making the application. Dilatory conduct however censurable does not *per se* preclude the court from exercising its discretion to allow such an amendment

In **Mitchell v Harris Engineering Co. Ltd.**, at page 719 Denning M.R. said:

> *"I can well understand the defendant taking the point. They thought that the claim was so shadowy and so stale that it would be a good thing to stop the action at the outset. But the point is not a good one. They must fight the case on the merits."*

Let me now consider Mr. Leiba's submission that Wright's Motor Services Limited might be exposed to judgment above the policy limit because of the claimant's delay in bringing the application.

Matters, by virtue of the sheer volume of work in the court system, take a number of years to be heard in any event. There is no evidence that this matter, had the application been made earlier would have been heard any or much earlier. In any event

the court is amply invested with the requisite powers to register its displeasure at delays by addressing the issues of costs and interest.

The submission that the accident occurred in January 1993 and the trial date might not be obtained until 2007 by itself is not a good reason to refuse the application.

In **Horne Roberts** the vaccine was allegedly administered in June 20, 1990. The error was discovered in August of 2000 and the court allowed the application.

I am also mindful of the fact that the error of the Minute Sheet and the letter of the 1st and 2nd defendants' attorney dated November 12, 2002 had inadvertently perpetuated the mistake.

In determining whether to allow the substitution I must be mindful of the overriding objective, which is to do justice. I am not satisfied that the defendant was misled nor am I satisfied that prejudice would occur to them if permission to substitute is granted. Accordingly:

1. Permission granted to the claimant to substitute Wright's Motor Services Limited for Clinton Wright.
2. The claimants are permitted to amend their Writ of Summons and Statement of Claim in terms of the draft Writ of Summons and Statement of Claim filed herein within seven (7) days of the date hereof.
3. The named Writ of Summons and Writ of Claim to be served on the defendants and Wright's Motor Service Limited within 14 days of the date hereof.
4. The defendants are permitted to amend their defence if they deemed it necessary. Amended defence to be served on the claimant.
5. Cost to the 3rd and 4th defendants to be taxed or agreed.
6. Special certificate regards to cost to 3rd and 4th defendants.