IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL. 323 OF 1996

BETWEEN	CARIBBEAN DEVELOPMENT CONSULTANTS	CLAIMANT
AND	LLOYD GIBSON	DEFENDANT

Miss Juliet Bailey instructed by Forsythe and Forsythe for the claimant

Mr. Garth McBean instructed by Garth McBean & Co. for the defendant

April 19, 2004, May 3, 25 2004

Sykes J. (Ag)

AMENDMENT UNDER RULES 19.4 AND 20.6 OF THE CIVIL PROCEDURE RULES

A technical point

The survival of this claim depends upon whether the claimant can resist the point made by Mr. McBean. There is no question of filing a new claim if the defendant succeeds. If the preliminary point is successful the defendant would be able to scurry away with both the outstanding professional fees as well as the benefit of the claimant's work.

Mr. McBean has raised a small but important technical point. It may be said with, great justification, that having regard to the facts of this case the defendant is an undeserving person to have the claim dismissed. The defendant did receive the benefit of professional services. Be that as it may, undeserving or not, the point has to be considered and dealt with according to law.

The point can be reduced to this: only legal entities can sue or be sued. The claimant is not a legal entity. Therefore the claimant cannot sue. The legal consequence of this, he says, is that the matter should be struck out unless it can saved by rule 19.4 of the Civil Procedure Rules (CPR). He submits that that rule cannot save this matter from oblivion. A bit of context is necessary.

A sad tale

The affidavits filed by the attorneys for the claimant reveal some degree of carelessness. None of them seemed to have done the elementary research to ensure that Caribbean Development Consultants (CDC) was a legal entity. This "discovery" was made by the attorneys for the defendant.

Mr. Joseph Jarrett, the first legal adviser of the claimant, in his affidavit states that he was first instructed by a Mrs. Schatzi McCarthy who told him that she was a director and consultant of CDC. He said that she also told him that the entity was a registered company. He received further instructions from Mr. McCarthy and Mr. K. Fosu Attah who gave the impression that CDC was a registered company. Mr. Jarrett goes on to say that he drafted documents including a writ of summons and a

statement of claim but handed them over to Mr. Nelton Forsythe of the firm of Forsythe and Forsythe. He (Mr. Jarrett) had nothing further to do with the matter.

Mr. Jarrett did not check to see whether CDC had capacity to sue or be sued. He acted upon what he was told by Mrs. McCarthy and the impression given to him by Mr. McCarthy and Mr. Attah. He adds that he has had no contact with CDC or its "directors" since 1996.

The baton was now passed to Forsythe and Forsythe. They too did not make any enquiries to determine whether CDC was a legal entity.

Mr. McBean says in his affidavit that he wrote two letters, dated February 11, 2000 and May 30, 2000, to Forsythe and Forsythe. These letters were not exhibited since they contain other material which counsel says is subject to legal professional privilege. The letters raised the specific issue of whether CDC was a legal entity. These letters were written within the limitation period. Had counsel acted the error could have been corrected. This was not done. Not even the final letter of February 4, 2003 in which the specific threat of striking out the action aroused the legal advisers of CDC from their slumber.

Mr. Nelton Forsythe in his affidavit acknowledged that he received the two letters referred to by Mr. McBean. He said he did not respond because the parties had arrived at a settlement and so there was no need to take any steps to regularize the status of the claimant. He added that the settlement was scuttled because it was unacceptable to all the "directors" of CDC. The release and discharge required by the defendant was no longer forthcoming.

It is agreed that the negotiation broke down. Once the negotiations broke down the litigation mode should have

been adopted and all steps taken to have the matter ready for trial. Indeed based upon Mr. Forsythe's affidavit the break down occurred in May 2000, well within the limitation period.

Significantly, he adds that the persons instructing him contacted him infrequently. He understood that they were either the United States of America or Ghana. He says that he never had a telephone number or address for any of the "directors". I should add that even at the hearing Miss Bailey was not able to say with any degree of certainty where her clients were.

In my view there can be little justification for the attorneys' omission to see that the suit was filed in the name of some one or some entity that had capacity in law to maintain the action.

The Submissions

Rule 19.4 states

> *(1) This Rule applies to a change of parties after the end of a 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.

Rule 20.6 states

(1) This Rule applies to an amendment in a statement of case after the end of a relevant limitation period.

(2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was-

(a) genuine; and

(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question

Mr. McBean submits that Rule 19.4(3)(a) does not stand by itself. If the claimant is to benefit from this Rule he must satisfy Rule 19.4(3) (a) **AND** 19.4(3) (b) **or** 19.4(3) (a) **AND** 19.4(3) (c). In other words satisfying Rule 19.4(3) (a) alone is not enough.

Counsel submitted that "mistake" in Rule 19.4(3)(a) only refers to circumstances where (i) there is an error in stating someone's name (i.e. misspelling of a name) or (ii) a party was named because it was thought that he was "A" but he really is "B" (i.e. mistake as to identity). Therefore, according to counsel, one must establish either category of mistake and couple that with either 19.4(3) (b) or (c).

Mr. McBean submitted that the text of rule 20.6 supported his contention since 20.6(2)(a) requires that the mistake must be genuine. According to learned counsel mistake in this rule must carry the same meaning as "mistake" in Rule 19.4(3) (a). The requirement that the "mistake" should be genuine makes it clear that the meaning of "mistake" is as he earlier submitted. i.e. a mistake either as to name or as to identity. He says that the mistake in this case does not fall into either category. He concedes that there was an error in this case in naming an unincorporated body as the claimant but that error is a mistake as to the capacity of an unincorporated body to maintain a claim. This is not the kind of mistake contemplated by either rule.

Miss Bailey did not embark upon the analysis of the kind engaged in by Mr. McBean. She relied on rules 1.1 and 1.2 of the CPR. These rules say that the overriding objective is that cases must be dealt with justly.

The Analysis

Rules 19.4 and 20.6 deal with two distinct and separate situations. Rule 20.6 is directed at a situation where there is a misspelling and not a misidentification.

Both rules assume that the person being sued or suing has the legal capacity to be a proper party to court proceedings.

Rule 19.4 deals with a change of parties after the end of a limitation period, not spelling errors. The error in this rule is misidentification. This can arise in two ways: the first where the party named is really "A" but you think he is called "B". In this case the right person is before the court but under the incorrect name. The second is where one intends to sue the person who committed a particular tort (for example) but you identify the wrong person completely. To put it another way "C" is named as the tortfeasor but the real tortfeasor is "D". Any correction of these types of mistakes will always lead to a change of parties. This is why the opening words of the rule 19.4 say: the rule applies to **change of parties after the end of a relevant limitation** period. The change of party is either to add a party to the proceedings or to substitute another party for one who is presently before the court. I should add that this analysis ignores the issue of addition of parties since that issue is not before me. The issue is substitution of parties.

I am convinced that Mr. McBean's interpretation of rule 19.4 could not possibly be correct. Let it be tested in this way. Suppose a party, whether claimant or defendant, assigns his interest to another or becomes bankrupt or suppose a party dies and his executor wishes to continue the action it could not be said, in any of these instances, that there was a mistake when the original party became a party to the proceedings. I am assuming for the purposes of this analysis that the original party was properly identified and properly named. In this example

Rule 19.4(3)(a) could never ever be satisfied but undoubtedly Rule 19.4(3)(b) would be satisfied i.e. the interest or liability of the former party has passed to the new party.

On Mr. McBean's submission the court could never ever order that the original party be substituted since according to Mr. McBean any substitution or addition of parties requires that Rule 19.4(3)(a) **and** either Rule 19.4(3)(b) or (c) must be satisfied.

To state the argument another way: a person who satisfies Rule 19.4(3)(b) or (c) but who could never ever satisfy Rule 19.4(3)(a) could not possibly hope to be substituted for any of the original parties.

I am convinced, therefore, that paragraphs (a), (b) and (c) of Rule 19.4(3) are to be read disjunctively. A person may satisfy all three or any one.

However I agree with Mr. McBean that naming a person who has no capacity to sue or be sued is outside rule 19.4. This is so because a nullity by definition is incapable of having any party substituted.

The House of Lords in ***Lazard Bros & Co. v Midland Bank*** [1932] All E.R. Rep. 571 held that as soon as it appears to the court that a judgment debtor did not exist at the date of the writ then the judgment obtained against the debtor is a nullity and must be set aside. The evidence was that at the time of the issue of the writ, judgment and the garnishee proceedings the debtor Russian bank had been dissolved and no longer existed in law. The CPR have not affected such a fundamental rule and it is still applicable today.

As recently as 2000 the Court of Appeal of Jamaica in ***Junior Doctors Association and another v The Attorney***

General Motion No. 21/2000 and Suit No. E 127/2000 (delivered July 12, 2000) had to consider the effect of granting an ex parte injunction against the Association which was an unincorporated body. The Court upheld the submission that the Association was not a legal entity and so was incapable of being sued or sue and as such the proceedings were a nullity. The learned President, Forte P, expressly rejected the argument submitted on behalf of the Attorney General that the term "Central Executive of the Junior Doctors Association" named an identifiable group of persons. This was a valiant attempt to get around the fundamental point that only legal persons can sue or be sued.

There are two cases that deal with the question of whether a substitution is permissible if one of the parties did not exist in law at the time the action was filed. The first is ***International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp. of India*** [1996] 1 All ER 1017 the Court of Appeal of England and Wales held that where an action had begun in the names of companies that were dissolved prior to the commencement of the action the proceeding is a nullity. In coming to this conclusion the court rejected the application to substitute the trustee for the companies. In this case the matter was considered under the old Rules of the Supreme Court. Under Order 15, r6 the court had the power to add or substitute a new party after the end of the limitation period. Evans LJ held that the rule clearly had in mind that there was an existing action to which the addition or substitution may be made. For the learned Lord Justice this meant that if any of the parties did not exist in law at the time of the commencement of the action then there is a nullity.

The other case is ***The Sardinia Sulcis*** [1991]1 Lloyds Rep. 201. After a collision between two vessels a writ was issued in the name of the owners of the ***The Sardinia Sulcis*** on April 14, 1981. In March 1987 the parties reached an agreement where the defendant accepted that he was 65% responsible for the collision. It was discovered that the owners of the vessel had ceased to exist before the writ was issued. In 1980 the defendant took the point that the writ was issued after the plaintiff ceased to exist. In other words the proceedings were a nullity. If the plaintiff were to reap success they had to escape from the ***Lazard Bros.*** case (supra). They had to establish that they misdescribed themselves as distinct from commencing the action in the name of a non-existent person. The attorneys who filed the writ said that they made a genuine mistake and did not know that the plaintiff had ceased to exist. Despite this the Court of Appeal was able to say that what happened was a mistake as to name and the correction could be done even if the effect was to substitute a new party.

It is important to note that in this case the Court of Appeal accepted that the error was made by the attorneys. They should have checked to see that the person in whose name they were going to issue the writ was a legal person. This is really basic preparation. It is difficult to see how the ***Lazard*** *case* (supra) was avoided. This could hardly have been a case of an error in description. The plaintiff was not described incorrectly. The plaintiff named was the person intended to be named. This was not a case of thinking that "A" was called "B". "A" simply did not exist when the writ was filed and issued. Is this case really distinguishable from ***Lazard***?

I prefer the judgment of Evans LJ in the ***International Bulk Shipping*** case (supra). It seems to me, therefore, that the fundamental rule of which I have already spoken has survived into the new rules. There is nothing in the rules to suggest to me that any court can breathe life into a nullity. If any of the parties are not legal persons then the action must be stopped.

It is true that the CPR is totally new and the old law should not be carried forward but as one judge observed as we go forward the "odd glance in the rear view mirror may be necessary" from time to time (see David Foskett QC sitting as Deputy High Court Judge of the Queen's Bench Division in ***International Distillers & Vintners Limited (t/a Percy Fox & Company) v JF Hillebrand (UK) Limited and others*** **(unreported judgment delivered December 17, 1999)**). This is one such case.

The new rules were intended to govern the conduct of litigation but it would be very surprising, without saying so expressly, that these rules could somehow save a claim from being a nullity if it turns out that one of the parties does not have legal personality.

CONCLUSION

My conclusion is that there cannot be a substitution of parties, under rule 19.4, after the expiration of a limitation period where the original proceeding is a nullity. One of the ways in which a nullity arises is where one party to the suit is not a legal entity. CDC is not a legal entity. The original proceeding was therefore a nullity. If this amendment were allowed it would bring into existence what never existed in law.

The point made by Mr. McBean is upheld and the claim is dismissed. Costs to the defendant to be agreed or taxed. Leave to appeal by the claimant granted.