IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. F 013 OF 1997

BETWEEN **ELITA FLICKINGER** **CLAIMANT**

(Widow of the deceased ROBERT FLICKINGER)

AND **DAVID PREBLE**

(t/a as XTABI RESORT CLUB & COTTAGES) **FIRST DEFENDANT**

AND **XTABI RESORT CLUB & COTTAGES LIMTED** **SECOND DEFENDANT**

IN CHAMBERS

Mr. Ainsworth Campbell for the claimant

Mr. Christopher Samuda instructed by Piper and Samuda for both defendants

November 6, 23, 2004, December 16, 2004, January 6, 14, 21, 28, 31, 2005

Sykes J

APPLICATION UNDER RULE 20.6 OF THE CIVIL PROCEDURE RULES

1. This judgment is only in respect of one of three applications made by the claimant. The other two applications have been dealt with and will not be mentioned any further except in relation to costs.

2. It was February 1995. Mr. and Mrs. Flickinger were drawn to the isle of Jamaica. Mr. Flickinger loved the sea. He loved to be in the sea. In fact, he was an avid snorkeller. It might be that the opportunity for snorkeling attracted him

to the property in West End, Negril, Westmoreland at which the Xtabi hotel is located. An added attraction might have been the famed sunset in that part of the island. This area of Jamaica has attracted all sorts for a long period of time – from the hippies of the 1960s to hedonists of the 1990s and now marathon participants in the early 2000s. The old, young, able bodied, athletes in wheel chairs, runners and walkers all flock to Negril in December to participate in the annual Reggae Marathon.

3. What should have been a holiday in paradise, for the Flickingers, soon became a tragedy. Mr. Flickinger was indulging his passion for snorkeling shortly after arriving at the property in February 1995. At first, all seemed well. Suddenly, he was in difficulty. Regrettably, he perished in the sea he loved so well.

4. By 1997, Mrs. Flickinger had recovered sufficiently to consider legal action. She retained the redoubtable Mr. Ainsworth Campbell, an attorney whose practice has spanned all the years of Jamaica's independence. The action is in negligence and under the Fatal Accidents Act. It is not necessary for me to go into the details of the claim. I will only state those facts that are necessary for this decision.

5. Mrs. Flickinger sued David Preble and Xtabi Resort Club & Cottage Limited. The writ of summons stated the address of both defendants to be West End, Negril, Westmoreland. Both defendants filed defences. The claimant filed her writ on February 10, 1997 and her statement of claim on August 15, 1997. The defendants filed on November 24, 1997.

6. The endorsement on the writ of summons reads in part

> *The Plaintiff's claim...is brought in negligence against the defendants jointly and/or their servants or agents to recover damages for the wrongful death of the deceased by drowning at the premises of the Defendant' (sic) or the environs of the premises of the Defendants (sic).*

7. This was fleshed out in the statement of claim where the defendants were described as the owner and occupier of premises at Negril, Westmoreland. This was in paragraph three. The defendants filed a defence in which they admitted that they were owner and occupier. The claimant amended her statement of claim on a number of occasions. The defendants were full participants in these applications.

8. On June 19, 2001, Brown J (Ag) granted the defendants permission to file an amended defence. At no time between 1997 and 2001 did the second defendant indicate that it was wrongly named. In the amended defence, both defendants denied that they were the owner and occupier of the premises. The amended defence reads in the material parts at paragraph three:

> *Save that the Defendants admit that the First Defendant was the Manager of the Resort located in Negril in the parish of Westmoreland nearby the sea, paragraph 3 of the Amended Statement of Claim is denied.*

9. The defendants by their amended defence are saying that Mr. Preble was the manager of the hotel that was in operation at the material time but neither he nor the second defendant owned or occupied the property. Even at this early stage, it seems clear to me that the claimant intended to sue the operator of the hotel at the material time and this was why she described both defendants as owner and occupier of the premises. This amended defence suggests that the defendants understood the action those terms as well.

10. During the long and tortuous course of this matter, the defendants applied for and were granted security for costs against the claimant. Anderson J made this order on April 4, 2002. It seems that the claimant had difficulty meeting the order. This led the defendants to apply for a dismissal of the action because of the failure of the claimant to comply with the order for security for costs. The summons for this application was filed on July 27, 2002. It was supported by two

affidavits. One from David Preble, the first defendant; the second from Mrs. Fay Chang-Rhule, then attorney at law for both defendants.

11. Mr. Preble's affidavit, dated July 1, 2002, stated that his address was in care of Xtabi Resort Limited. He adds that he is authorised to depone on behalf of Xtabi Resort. His affidavit refers to the deleterious effect the action was having on the resort. He even added, "*a witness of fact employed to the Resort at the time of the incident has now migrated and contact cannot be established and therefore she will be unavailable at the trial as a witness for the Defence and this clearly will prejudice the Resort and myself.*" (see para. 4)

12. The affidavit of Mrs. Chang-Rhule refers to the second defendant as Xtabi Resort.

13. The claimant now applies under rule 20.6 of the Civil Procedure Rules (2002) (CPR) to correct the name of the second defendant after the action has become statute barred. She says that the name Xtabi Resort Club and Cottage Limited was placed in error on the writ of summons and statement of claim. The correct name should be Xtabi Resort Limited. Mr. Samuda opposes this application. He submitted that the claimant's application under rule 20.6 would have the effect of substituting a new party in place of the second defendant. He said that this is nothing more than an application for a change of party masquerading as a correction of name. Learned counsel warned that if this application were granted, the "new party" would be deprived of its limitation defence. For these reasons and others, he submitted, the application should not be granted.

14. Mr. Campbell swore an affidavit in support of this application. He frankly concedes that the amended defence of the second defendant denied that it was the owner and occupier of the property where the deceased died. Mr. Campbell admitted that he did not notice this amendment until "recently". The affidavit does not specify how recent is "recently". This "discovery" led him to search the

companies register on November 26, 2004. It was then that he found out that the second defendant was improperly described and should be called the name he is now proposing.

15. The affidavit does not say whether Xtabi Resort Club and Cottage Limited is an existing company. The court file, however, shows that appearances and a single defence were filed for both defendants. This suggests that the second defendant, as named, is a legal person. I will assume for the purposes of this application that the second defendant is an existing legal person. The affidavit does not explain how this error came about. The affidavit simply says that the claimant thought, based upon the fact that the second defendant never raised the issue of misnaming, that no issue was being taken about the name.

16. Mr. Campbell's affidavit is not as fulsome as is desirable. There is no clear explanation indicating why he made the error. This would assist in determining whether the mistake is one of identity or name.

17. The distinction between misnaming and misidentification is crucial and fundamental to the resolution of this application. This case involves consideration of rules 19.4 and 20.6 of the CPR.

Analysis of rules 19.4 and 20.6

18. I shall set out both rules and indicate what I understand to be the difference between them. Implicit in Mr. Samuda's submission is a reference to rule 19.4 that deals with addition or substitution of parties. This question of substitution/addition of parties and correction of a name has been a troublesome one in the history of civil procedure.

19. Often times, whether because of carelessness or otherwise, errors are made when the claimant is seeking to identify and name the correct defendant. The risk of error is perhaps greater when one is suing a company. Sometimes the wrong tortfeasor is sued. At other times, the correct tortfeasor is sued but is given a wrong name. The wrong name may be a simple case of misspelling or it

may be much more serious such as giving the defendant the name of an existing person. When a correctly identified defendant is given, erroneously, the name of an existing person, the situation closely resembles one in which the wrong defendant is identified. Outwardly, both are the same. It will often be a close call to decide which it is. This is why a clear comprehensive account setting out how the error occurred is important. The problem is accentuated if the defendant, as here, challenges the application to correct the name on the basis that the application is not a correction of a name but, in reality, is an application to substitute a new party for an existing one. What then are the courts to do?

20. The courts have sought to resolve the issue by what I consider to be the most intelligible and sensible way. The courts ask, "Who did the claimant intend to sue?" In answering this question, the courts look at all the circumstances of the case. In many cases, reasonable judges can come to different conclusions on the facts (see the dissent of Waller LJ and the majority judgment of Donaldson LJ (as he was at the time) in ***Evans Constructions Co Ltd v Charrington & Co Ltd*** [1983] QB 810). I accept this approach as fundamentally sound.

21. I shall divide this analysis in two parts. The first will deal with the broad differences between the two rules. The second will focus on rule 20.6 in particular.

a. Part one

22. The CPR, 2002, (Jam) provides as follows:

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. (my emphasis)

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

23. I am of the view that both rules are directed to two different situations. Briefly, in rule 20.6 the mistake there is intending to sue A but calling him B. In this situation, the correct defendant is before the court but he is sued in the wrong name. There is no question here of depriving the defendant of any limitation defence. It is simply getting the name right. However in rule 19.4(3)

(a) the mistake is suing A thinking that the A was the tortfeasor, when in reality B was the tortfeasor. The parts of the CPR in which the rules are located reinforce this conclusion.

24. Part 19, in which rule 19 appears, deals comprehensively with **addition and substitution of parties**. Rule 19.1 declares that this part deals with change of parties after proceedings have commenced. Rules 19.2 and 19.3 cover change of parties before the limitation period has ended. Rule 19.4 is the part of the rule that addresses change or parties **after the end of a limitation period**. Rule 19.4(1) says that this rule applies to a change of parties after the end of a relevant limitation period. Rule 19.4(2) and (3) lays down the criteria that must be met before there can be a change of parties. Rule 19.4(2) requires that the action must have commenced before the limitation period expired and that the change is necessary. Rule 19.4(3) states define the circumstances that meet the criterion of *necessary*. The three subparagraphs are to be read disjunctively. This is so because it is possible for the necessity to change a party to arise under one of the subparagraphs and not the other two. For example, a company may assume the interest and/or liability of another company and so has to become a party to the claim but the original company was not named by mistake.

25. Rule 20.6, on the other hand, appears in the part of the rules dealing with amendment of case. Rule 20.6 governs **change of name** after the limitation period has expired. From just reading the two sections and applying ordinary rules of grammar it is clear that there is a difference between "**named** in the claim form **by mistake for the new party**" and "a **mistake as to the name of a party**". It is vital that this distinction be understood. The former is speaking to identifying the wrong person while the latter is calling the right person by the wrong name.

26. There are cases that support this construction of the provisions. In this regard, it is necessary to refer to the equivalent English rules in the Civil Procedure Rules 1998 (CPR), (UK) and cases decided under them.

27. I have already set out the two rules from the Jamaican CPR that concern this case. Rule 19.5 of the CPR (UK) covers the same ground as rule 19.4(3) of the CPR (Jam). Rule 17.4(3) of the CPR (UK) is quite similar to 20.6(2) of the CPR (Jam).

28. Mr. David Foskett QC (sitting as a Deputy High Court Judge of the Queen's Bench Division) in the case of ***International Distillers & Vintners Limited (t/a Percy Fox & Company) v JF Hillebrand (UK) Limited and others*** (December 17, 1999) articulated the difference between the rules. The Court of Appeal in Gregson v Channel Four Television Corpn (The Times, 11 August 2000; Court of Appeal (Civil Division) Transcript No 1290 of 2000 approved this case. The Court of Appeal in ***Horne-Roberts v SmithKline Beecham plc and another*** [2002] 1 W.L.R. 1662, reaffirmed Mr. Foskett's interpretation of the rules.

29. A striking example of the application of rule 19.4(3) (a) (CPR) (Jam) is ***Horne-Roberts,*** a case under rule 19.5 of the English rules. In that case, the claimant sued Merck thinking that it had manufactured the offending pharmaceutical product. SmithKline Beecham plc was the manufacturer and the potential tortfeasor. The wrong defendant was before the court. It was a mistake as to identity and not as to name. The claimant discovered the error after the limitation period had passed. She applied to substitute SmithKline Beecham plc. Naturally, SmithKline resisted. SmithKline argued that the "mistake" did not fall within the CPR (UK) rule 19.5. The CPR (UK)), rule 19.5, as they stood at the time reads at the relevant paragraphs:

Rule 19.5 (2) (b):

"(i) the court may . . . substitute a party only if:

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

(b) the . . . substitution is necessary."

And rule 19.5 (3)

"the . . . 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 . . ."

30. The Court of Appeal upheld the first instance judge's decision to grant the substitution on the basis that the claimant intended to sue the manufacturer of the defective product. The importance of the decision is not so much the fact that they upheld the decision as the reasons advanced in support of it. The Court relied on the reasoning of another Court of Appeal decision. This was a decision under the old rules. This was the decision of ***Evans Constructions Co Ltd v Charrington & Co Ltd.*** In that case, the claimant named defendant Charrington & Co Ltd when it should have been Bass Ltd. The Court of Appeal in ***Horne-Roberts*** adopted the analytical framework of Donaldson LJ in ***Evans.*** Donaldson LJ said at page 821:

> *[I]t is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. ... Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances.*

31. The lasting significance of Donaldson LJ's judgment, however, is his analytical device to determine whether the mistake was one of

misidentification or one of misnaming. It is still important today to determine which type of mistake is under consideration in order to determine whether the application falls under rule 19.4(3) (a) or rule 20.6(2) of the CPR (Jam). Different conditions apply to each rule. The Lord Justice said that the key is to find the intention of the party making the mistake. The next question is, "What do you look at to determine the intention of the person making the mistake?" According to Lloyd LJ in ***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep 201, 207, you look at how the claimant described the intended defendant. I would add that you look also at the particulars of claim to see what is being alleged in order to get a better understanding of the claimant's intention. This is important because as I shall show later on, in the case before me, the particulars of the statement of claim put it beyond any doubt that the claimant was targeting the operators of the hotel at the time of her husband's death. This is consistent with rule 20.6(2) (b) that suggests that one ought to have regard to all the circumstances of the case.

32. The case of ***Gregson*** provides an example of an instance of misnaming. In that case, the claimant had filed suit naming the defendant as *Channel Four Television Company Limited* when it should have been called *Channel Four Television Corporation.* Lord Justice May upheld Moreland J's decision to grant the amendment. In so doing, the Lord Justice rejected the appellant's submission that the case fell within rule 19.5. The facts were that the claimant called the defendant the wrong name. The defendant pointed out the error. The limitation period had passed when the claimant applied to correct the name and to extend time within which to serve the documents. The appellant contended that the application was in reality a substitution of parties. Moreland J held that *Channel Four*

Television Corporation was properly served because what occurred was a misnaming of parties and it was not a case of mistaken identification and so there was no need to extend time within which to effect service. This case is significant because the defendant named was an existing company (*Channel Four Television Company Limited*) that was a part of the same group as *Channel Four Television Corporation*. In ***Gregson***, the defendant's attorney conceded that the error was genuine and not one which would have caused reasonable doubt as to the intended defendant.

33. ***Gregson*** shows that misnaming goes beyond misspelling. To put the matter beyond doubt let me set out rule 17.4 (3) in the United Kingdom at it stood at the time

> *The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one that would cause reasonable doubt as to the identity of the party in question."*

b. Part two

34. I will expand on rule 20.6(2) of the CPR (Jam). It is clear that mistake under this rule cannot be confined to misspellings. Misspellings are only one form of mistake. The fact that the name given to the defendant actually belongs to an existing person, legal or natural, does not make it any less of a mistake (see ***Gregson*** per Peter Gibson LJ at para. 31). If rule 20.6(2) were intended to exclude this possibility, it would have said so. One implication of this conclusion is that a successful application under rule 20.6 may have the appearance of a substitution of parties.

35. When subparagraph (a) speaks of the mistake being genuine, what is meant is that the party making the mistake must have honestly thought that the name he gave the intended party was really that party's name. Subparagraph (b) had to included because the court must be satisfied that

by whatever name the intended party was called, he was properly identified but called the wrong name. This subparagraph is directing the court to consider the matter carefully to see if the application is properly under rule 20.6. If an application under rule 20.6(2) required only that the mistake was genuine then such an application would be indistinguishable from an application under rule 19.4(3) (a). Even though rule 19.4(3)(a) does not use the word "genuine", it is my view that it is necessarily implied since in the normal course of things no one deliberately sues or joins a person who is unconnected to the claim.

36. The contrast between ***Horne-Roberts*** and ***Gregson*** reinforces the distinction between the two rules. In ***Horne-Roberts,*** the wrong tortfeasor was sued. In ***Gregson,*** the right person was identified, by description, but was called *Channel Four Television Company Limited* instead of *Channel Four Corporation Limited.*

Application to the facts

37. I do not accept Mr. Samuda's submission that the application was in substance a change of party. This is not a case of a change of party as contemplate by rule 19.4(3). As I have endeavoured to show, to describe the result as having a "new defendant" is to misdescribe what happens under rule 20.6. What happens is that the real name of the defendant is now being put on the court record. Mr. Samuda's submissions are predicated on a very narrow definition of mistake under rule 20.6(2). Mr. Samuda's definition would confine mistake to misspellings alone. The authorities do not support such a narrow definition.

38. In this case, the claimant identified the defendants as the owner and occupier of the premises. This could only mean owner and occupier of the

premises at the material time. The defendants initially accepted this description of themselves. The claimant and her husband were guests at the hotel at the time when the death occurred. The hotel was a going concern. It was in operation. As Lord Denning has reminded: when one speaks of occupier in this area of law it is simply shorthand for saying those who have sufficient degree of control over premises so that they have a duty of care to those who lawfully come unto the premises (see ***Wheat v Lacon Co Ltd*** [1966] AC 552, 577- 578). The details of the pleading and the particulars of negligence put the matter beyond doubt. The allegations in the statement of case could only be directed to the operator of the hotel.

39. The affidavit of Mr. Preble filed in support of the summons to dismiss the action speaks volumes. Paragraph three of his affidavit that I quoted earlier in this judgment makes it clear that he regarded the suit as being against the operators of the hotel at the material time. If this were not so, what other explanation can there be for him to say that one of the defendants witnesses who was employed at the Resort at the time of the incident is no longer there? Mr. Preble spoke for both defendants. Why would the defendants need this witness if it were not to attempt to refute the specific allegations of negligence regarding how the hotel was operated at the material time? When he speaks in his affidavit of the suit becoming "*increasingly expensive for the Resort*", could he really have been referring to persons other than the operators at the material time? When the amended defence refers to Mr. Preble as the manager of the Resort and denies that he was the owner and occupier, he must have been saying that he (as manager) was involved in the operation of the hotel. It is important to note that the address given by the claimant of the second defendant is West End Negril. Mr. Preble gives his address as care of Xtabi Resort Limited, West End, Negril P.O. It is common ground that the hotel at which the Flickingers were staying is located in West End, Negril. There is

nothing to indicate that Mr. Preble and the second defendant understood the action in any other way, other than that the claimant was suing them as operators of the hotel at the material time.

40. The fact that the trial has commenced is not a bar to the application. It must be in rare circumstances that a court could find that a case fell within rule 20.6 and still deny the application (see ***Gregson***). If the proper defendant is before the court, how can calling him his correct name prejudice him?

Conclusion

41. The amendment sought here is not a change of parties but a change of name. In all the circumstance of this case, no one could reasonably doubt who was the intended defendant. I have not taken into account the notes of evidence exhibited to Mr. Campbell's affidavit. The application made by the claimant by notice of application dated December 9, 2004 is granted. Three days costs in respect of all three applications to the defendants to be agree, certified or taxed. These costs are awarded on the basis that these applications ought properly to have been made years ago. With a bit of diligence the claimant could have easily found out the correct name of the second defendant. Also on the first day of hearing, the claimant needed an adjournment to get her all applications together and even then, two more applications were added after the hearing began. This kind of inefficiency imposed avoidable costs on the defendants and they ought properly to be compensated.