[2023] JMSC Civ 159.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV03341

BETWEEN	**SHERROD HEMANS**	**CLAIMANT**
AND	**TYSHAWN OMAR WALTERS**	**1ST DEFENDANT**
AND	**ANTHONY MORRISON**	**2ND DEFENDANT**

Mr. Lance Lamey instructed by Bignall Law for the claimant.

Miss Houston Thompson instructed by Dunbar & Co for the 1st defendant.

Heard: May 4, 2023, and September 29, 2023

Application to amend statement of case - CPR 19.4 - adding a defendant after the limitation period -whether case of misidentification or misnaming - CPR 20.4 – application to strike out claimant's statement of claim.

CORAM: JARRETT, J.

It is only fitting that I pause to pay tribute to Counsel Mr Lance Lamey (deceased), who argued the application on behalf of the claimant, before his untimely death in June 2023. He will long be remembered for his ready wit and remarkable tenacity.

Introduction

[1] There are two applications before me for determination. One filed by the claimant under CPR 19.4(1), 19.4(2) (a) and (b), and 19.4(3) (a) and (c) for permission to amend his statement of case to add or substitute Aundray Brown as the 2nd defendant, for the named defendant Anthony Morrison. The notice of application

was filed on May 24, 2022, and is supported by the Affidavit of Vaughn Bignall, which was also filed on May 24, 2022. The application is in relation to a Further Amended Claim Form and Further Amended Particulars of Claim which were filed on the same day of the application. By his application, the claimant is asking that those amended pleadings stand, as filed, and served. Unsurprisingly, the application is stoutly opposed by the 1st defendant who has also filed his own notice of application seeking to strike out the further amended pleadings. This is the other application which is before me. It was filed on June 10, 2022. Since both applications are intrinsically connected, I will analyse and discuss them together.

The claim

[2] In his claim form filed on June 5, 2013, the claimant claims against Omar Walters and Anthony Morrison as 1st and 2nd defendants respectively. He alleges that on February 11, 2013, he was a passenger in the 1st defendant's Honda Fit motor car being driven along the Guys Hill Main Road by the 2nd defendant, when due to the negligence of the 2nd defendant, the motor vehicle collided into the front of a Toyota Corrolla motor car and then into the rear of an Izuzu motor truck, thereby causing him loss and damage. He brings his claim in negligence claiming that the 2nd defendant was the servant and/or agent of the 1st defendant at the material time.

[3] In the 1st defendant's defence filed on November 7, 2018, he denies knowing the 2nd defendant Anthony Morrison, and says that at the time of the accident, his cousin Aundray Brown was driving his Honda Fit motor car. Aundray Brown was not his servant or agent but had borrowed his car to visit friends. He denied that his motor car was in an accident with a Toyota Corrolla and an Izuzu motor truck as alleged by the claimant. The defence goes on to say that the 1st defendant does not know the claimant and further denies that the claimant was a passenger in his motor car at the material time. The defence was signed by Tyshawn Omar Walters and the name of the 1st defendant was modified in the heading of the defence to read: "Tyshawn Omar Walters (incorrectly referred to as Omar Walters)"

[4] An amended claim form was filed on February 1, 2021, by which the name of the 1st defendant was changed to Tyshawn Omar Walters and the 2nd defendant was now said to be the servant and /or agent and / or authorised driver of the claimant. Amendments were made to the pleaded special damages, but those amendments are not relevant to the current applications.

The claimant's application to amend the claim

[5] The application to amend to add or substitute Aundray Brown as the 2nd defendant is being made after the end of the limitation period. In an affidavit filed by Vaughn Bignall on May 24, 2022, in support of the application, Mr Bignall says that he is the attorney-at-law with conduct of the claimant's claim, and he received instructions from the claimant on June 5, 2013. He says that in the defence, the 1st defendant alleges that the 2nd defendant's name is incorrect, but the defence was filed: "dangerously close to the end of the expiration of the limitation period without sufficient time for the claimant to respond". Mr Bignall says his instructions were to amend the claim to give a "precise reflection" of the claimant's statement of case. He goes on to say that the court's permission for the amendment is required as the limitation period has expired, the changes sought are material to the claimant, as well as for a fair and just disposal of the issues at trial. His further evidence is that the filing of the claim with the 2nd defendant as Anthony Morrison was a 'genuine mistake', as it was genuinely believed that he was the proper party. According to Mr Bignall, the defendants will not be severely prejudiced by the amendment and if it is allowed, the claim will be tried on the same set of facts.

Claimant's submissions

[6] Mr Lance Lamey counsel for the claimant began his submissions by directing my attention to the abovementioned affidavit evidence of Mr Bignall. Counsel argued that it is the 1st defendant who would have the best information about who was in his car at the time of the accident. He posited that the name of the 2nd defendant would have been given to the claimant at the accident scene. Learned Counsel submitted that the defence was served on November 8, 2018, and amended

particulars of claim was filed to amend the 1st defendant's name to Tyshawn Omar Walters to keep the claim: "in tandem with the defence". He submitted that the court should infer that the failure to correct the name of the 2nd defendant was an oversight. It was further submitted that **Tikal Limited, Wayne Chen v Everley Walker [2020] JMCA Civ33,** was distinguishable from the present case as that case did not fall under CPR 20.6. The present case fell under CPR 20.6 as the claimant is seeking to correct an error and not add a party. Later, in his submissions in response to the 2nd defendant's application, Mr Lamey said that the claimant was not in fact relying on CPR 20.6.

1st defendant's submissions

[7] Miss Houston Thompson took several issues with the claimant's application. She argued that the 1st defendant's defence was served from November 8, 2018, yet the amendment to change the name of the 2nd defendant was not filed until May 24, 2022. Had the claimant acted promptly the application would not have been necessary. According to learned counsel, the amendment is being made in an attempt to meet the case of the 1st defendant and is not being made because of any genuine mistake. There was no "error", argued counsel. She submitted that the claimant was present at the scene of the accident and therefore would have been able to determine who was there.

[8] Counsel cited the decision in **Tikal Limited, Wayne Chen v Everley Walker** (supra) and argued that the amendment is introducing an entirely new party to the claim after the limitation period, which, she contends the court is not empowered to do. She said that if service were attempted on Anthony Morrison and also on Aundray Brown, there would be two different persons before the court. Anthony Morrison was the named driver at the time the claim was filed, which was five months after the accident. Ten years later, after the limitation period has expired, the claimant now attempts to change who the driver was. If such an application is granted, that would not be in keeping with the overriding objective of the CPR. Miss Houston further submitted that there would be incurable prejudice to the

opposing parties were the application to be granted, as Mr Aundray Brown in particular, would be joined to a claim after the expiration of the limitation period. In closing she said the application to amend was not made in good faith as this is not a case of a genuine mistake.

1st defendant's application to strike out the further amended claim form and particulars of claim

[9] In his application filed on June 10, 2022, the 1st defendant asks that the further amended claim form and further amended particulars of claim be struck out and that the amendment be disallowed. He relies on CPR 20.1, to ground his application and contends that an amendment to a statement of case after the expiration of the limitation is not permissible without the court's permission. In this case, the amended pleadings were filed without obtaining that permission. A further ground on which he relies is that the amendments will result in the addition of a new party to the claim after the limitation period. The cause of action arose on February 11, 2013, and the claim became statute barred on February 11, 2019. The 1st defendant's application is supported by the affidavit of Racquel Dunbar, attorney-at-law, filed on June 10, 2022, which exhibited an affidavit of the 1st defendant filed in support of his earlier application in which he successfully applied to set aside a default judgment which had been entered against him.

[10] Miss Thompson's submissions closely mirrored her earlier submissions made in respect of the claimant's application. She argued that there was delay on the claimant's part in making his application. Counsel said the claimant would have been aware that the 1st defendant was contending that he did not know Anthony Morrison and that the person driving his car at the material time was Aundray Brown, from the 1st defendant's application to set aside the default judgment. She said that a copy of the 1st defendant's draft defence was exhibited to the affidavit in support of that application. The claimant would therefore have been aware since June 2018 of the 1st defendant's case. There could have been a completely different accident involving Anthony Morrison, argued counsel, because there are

several differences in the claimant's pleaded case in relation to the accident as against what is contained in the 1st defendant's pleaded defence. Counsel submitted that the amendment is not "slight and genuine', but rather, it is a completely different person being added. As there are diametrically opposed versions of who was involved in the accident, CPR 20.6 would not apply.

[11] In her written submissions, Miss Thompson relied on several authorities which she submits have established the principles to be applied by the court on applications to amend a statement of case. She cited **Peter Salmon v Master Blends Feed Ltd Suit No. C.L 199.S-163, delivered October 26, 2007,** for the submission that the addition of a new party after the limitation period is impermissible. **Bryan Foods v Vanguard Security Company Limited [2016] JMSC Civ 98 was** relied on to argue that amendments can be made where they cause no injustice to the other side; they must be made in good faith; and that there is a distinction between amendments made before the limitation period and those made after the limitation period. Included in counsel's arsenal was also **George Hutchinson v Everett O'Sullivan [2017], JMSC Civ 91** which she cited for the submission that amendments may be granted when needed to decide the real issues in controversy between the parties.

Claimant's submissions in response to the 1st defendant's application

[12] Mr Lamey submitted that very little weight ought to be placed on the affidavit of the 1st defendant in support of his application to set aside default judgment, as that evidence is hearsay evidence. Counsel insisted that the amendment to change the name of the 2nd defendant was being made because a genuine error. According to him, the 2nd defendant had always been Aundray Brown, but an error was made in his name. This is therefore not a case in which the claimant was seeking to add a new party but rather one to change the name of the 2nd defendant. No prejudice will be meted out to the 1st defendant if the amendment is allowed as he would have the same case to answer. Counsel said the court at this stage need not

trouble itself with whether Aundray Brown could raise the limitation defence. That, he argued, is "for another hearing ".

Analysis and discussion

[13] As the issues in these two applications concern CPR 19.4 and 20.6, setting out in full these two provisions of the CPR is appropriate. They provide as follows:

"19.4 (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 started; and

(b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only of the court is satisfied that-

(a) the new party is to be substituted for a party which 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."

"20.6 (1) This rule applies to an amendment in a statement of case after the end of the 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.

[14] There is no absence of case law dealing with the application and interpretation of the above rules. The jurisprudence in this area is robust. Sykes J (as he then was) in **Peter Salmon v Master Blends Feed Ltd** (supra), observed that CPR 19.4 appears to extend the limitation period without there being any primary legislative amendment to undergird such a provision. The learned judge's observations were as follows:

> "It appears that the CPR is conferring a power to override an Act Parliament. The Limitation Act has not been amended to provide for this power to add parties after the end of a limitation period. It does seem remarkable that subsidiary legislation such as the CPR can override an Act of Parliament which provides a defence for a defendant not sued within the limitation period. The usual way of dealing with claims after a limitation period is by conferring a discretionary power on the court by an Act of Parliament to extend the time within which the claim can be brought (see section 4(2) of the Fatal Accidents Act; section 13(2) of the Property (Rights of Spouses) Act). 20. I reinforce this observation by making a comparison with the English position. Rule 19.4(2) (Jam) is, for practical purposes, identical in effect, to rule 19.5(2) (UK) … the general consensus, in England, is that rule 19.5 (UK) was designed to give effect to sections 33 and 35 of the Limitation Act of 1980 (UK) which give power to the court to allow new claims after the limitation period. The point is that I am not sure that rule 19.4 (Jam) can be applied without an Act of Parliament expressly conferring the power to sue defendants after the end of the limitation period." 8 (Unreported), Supreme Court, Jamaica, Suit No CL 1991/S 163, judgment delivered 26 October 2000."

[15] CPR 19.4 may well be an example of what can result from adopting rules of court from foreign jurisdictions without sufficient regard to the primary legislative foundations for those rules. Sections 33 and 35 of Limitation Act 1980 (UK) referred to by Sykes J in **Peter Salmon v Master Blends Feed Ltd** (supra), treat the addition or substitution of a new party as a new clam and allows the addition or substitution, where it is necessary for the determination of the original claim. A new party is considered as being necessary under section 35(6)(a) of the Limitation Act 1980 (UK) if : " the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name ", or if under section 35(6)(b) : " any claim made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action…". CPR 19.5 (UK) has its legislative provenance in the above-referenced sections of the Limitation Act 1980 (UK). CPR 19.5 (UK) and our CPR 19.4(3) are almost indistinguishable. However, we have no legislative parallel to sections 33 and 35 of the Limitation Act 1980 (UK). Therein lies the challenge.

[16] **Tikal Limited and Wayne Chen v Everley Walker** (supra), was an appeal from the decision of a Master who added a new party as a defendant to a claim, after the limitation period had expired. Morrison P, approving of the above-mentioned dicta of Sykes J in **Peter Salmon v Master Blends Feed Ltd** (supra), said the following at paragraphs 24 to 26:

> "[24] . . . It is a jurisprudential commonplace that subsidiary legislation is entirely derivative of primary legislation and, as such, cannot override it. As Lord Scott of Foscote stated in **Beverley Levy v Ken Sales & Marketing Ltd**, in which the issue was whether provisions of the CPR relating to the making of charging orders had any efficacy in the absence of enabling legislation, "while Rules can regulate the exercise of an existing jurisdiction, they cannot by themselves confer jurisdiction". It is therefore not possible for rule 19.4, whether expressly or by implication, to confer jurisdiction on

the court to extend a limitation period in the absence of any statutory warrant for such a course.

[25] It follows from this that the application to add a defendant after the expiry of the limitation period in this case was governed by the long-settled rule of practice at common law, which is that "the court will not allow a person to be added as defendant to an existing action if the claim sought to be made against him is already statute -barred and he desires to rely on that circumstance as a defence to the claim"

[26] In my view, therefore, to the extent that the learned Master's order adding the appellants as defendants after the expiry of the limitation period presumed a power to do so under rule 19.4, she clearly acted in error".

[17] The claimant's application as filed, is grounded in CPR 19.4. Although arguing that the 2nd defendant was always Aundray Brown but that an error was made in his name, Mr Lamey insisted in his oral submissions that the claimant is relying on CPR 19.4 and not CPR 20.6 and that this is not a case of the claimant seeking to add a new party to the claim after the limitation period.

[18] The distinction between CPR 19.4 and CPR 20.6 was discussed and analysed by Sykes J in **Elita Flickinger (Widow of the deceased Robert Flickinger) v David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club** (**Unreported), Supreme Court, Jamaica, Suit No CL F 013/1997, judgment delivered 31 January 2005**. After an examination of several English authorities, which applied both the CPR 19.5 (UK), its predecessor Order 20 rule 5(3) and CPR 17.4(3) (UK), the latter rule being similar to our CPR 20.6, Sykes J held that our CPR 19.4 deals with mistakes involving 'misidentification' while CPR 20.6 deals with cases of mistakes concerning 'misnaming'. Adopting the dictum of Donaldson L.J. in **Evans Limited v Charrington and Co. Limited [1983] 1QB810**, Sykes J said that determining whether a case is one of misidentification or misnaming, depends on

the intentions of the person making the mistake. He said that discerning the intention, may involve examining the statement of case.

[19] Determining whether any given case is one of misidentification or misnaming is however not always an easy task. The difficulty was discussed by Lloyd LJ In **Sardinia Sulcis v Al Tawwab [1991] 1 Lloyds L.R.201,** which is one of the decisions referred to by Sykes J in **Elita Flickinger (Widow of the deceased Robert Flickinger) v David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club** (**Unreported), Supreme Court, Jamaica.** At page 207 of the judgment Lloyd L.J said this:-

> "In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise, there could never be any doubt as to the person intended to be sued and leave to amend would always be given. So, there must be some narrower test. In **Mitchell v Harris Engineering** the identity of the person intended to be sued was the plaintiff's employers. In **Evans v Charrington**, it was the current landlord. In **Thistle Hotels v McAlpine** the identity of the person intending to sue was the proprietor of the hotel. In **Joanna Borchard**, it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus, if in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise. The point can be illustrated by the facts of **Rodriquez v R.J Parker.** In that case the identity of the intended defendant was the driver of a particular car. It was held that there was a mistake as to name. But if the plaintiffs had sued the driver of a different car, there would be a mistake as to identity. He would have got the wrong description."

[20] It is not clear from the affidavit of Vaughn Bignall in support of the claimant's application to amend his statement of case, who is alleged to have made the mistake in joining the Anthony Morrison as the 2nd defendant. However, it is plain from the particulars of claim that the intention was to sue the driver of the Nissan Tida as the 2nd defendant. The claimant now contends, in clear response to the defence, that the driver was Aundray Brown, not Anthony Morrison. Mr Lamey argued that Aundray Brown was always the intended 2nd defendant, but the mistake was in naming him Anthony Morrison. Based on the 1st defendant's defence the driver of the Nissan Tida at the time of the accident was Aundray Brown. The amendment being sought is to add or substitute Aundray Brown for Anthony Morrison, but the identity of the intended defendant is undoubtedly the driver of the Nissan Tida at the time of the accident. Applying the analysis of Lloyd LJ in **Sardinia Sulcis v Al Tawwab**, in my view it does not appear that the mistake in this case is as to identity. It seems to me that it is as to name. The authorities state that where the mistake is as to name, rather than identity, the applicable rule is CPR 20.6. The claimant's application to amend is however under CPR 19.4. His counsel unequivocally confirmed this in his oral submissions.

[21] The application being under CPR 19.4, means that the claimant is in fact seeking to substitute Aundray Brown for Anthony Morrison, as the 2nd defendant. This means that it is an entirely new person being joined as a defendant to the claim, roughly 4 years after the expiration of the limitation period. This is plainly not permissible. The claimant's application must therefore be refused, and the 1st defendant's application granted.

[22] Even if the claimant's application had been made under CPR 20.6, in the exercise of my discretion under that rule, I would also have refused it. In this case, the likely effect of applying CPR 20.6 to correct a mistake as to the name of the 2nd defendant, would amount, not simply to correcting the spelling of the name, but to substituting a different person as the 2nd defendant after the limitation period. I accept that the claimant intended to sue the driver of the Nissan Tida, but Miss

Thompson is right to contend that Aundray Brown and Anthony Morrison are likely to be two different persons. The evidence discloses that the claimant would have been aware from June 1, 2018, when the 1st defendant's application to set aside the default judgment was served; and again, reminded on November 8, 2018, when the 1st defendant's defence was served; that the 1st defendant was contending that he did not know Anthony Morrison and that it was Aundray Brown who was driving his Nissan Tida at the material time. In respect of the application to set aside the default judgment, this was approximately 8 months before the limitation period expired; and in respect of the defence, approximately 3 months. There was ample opportunity in my view, for the claimant to have taken timeous steps to amend his pleadings before May 24, 2022, the date of his current application. He ought to have acted sooner. Mr Lamey asked me to infer that the failure to correct the mistake earlier was an oversight, but there is nothing in Vaughn Bignall's evidence from which any such reasonable inference can be drawn. I would be reluctant in the circumstances, to join a person to the claim as defendant, roughly 4 years after the limitation period has expired and 10 years after the cause of action accrued.

Order

[23] In the circumstances, I make the following orders: -

a) The claimant's Notice of Application for Court Orders filed on May 24, 2022, is refused.

b) The 1st defendant's Notice of Application to Strike Out Purported Amendment to the Claim Form and Particulars of Claim filed on June 10, 2022, is granted.

c) Costs to the 1st defendant to be agreed or taxed.

d) A case management conference is scheduled for January 15, 2024, at 2.30pm for ½ hour

A Jarrett
Puisne Judge