C.A. WRIT — Amendment — whether a judge can allow an amendment to a writ which would have the effect of depriving a defendant of the protection of a statute of limitation — Dft substituted for other after limitation period — Judge had no "warrant" for exercise of discretion to allow the amendment

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 79/87

Civil Procedure
Comp

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

Cases referred to
Attorney General & Gov't v Richards (unreported) SCCA 39/86
Charlton v Reid (1960) 3 WIR 33
Weldon v Neale (1887) 19 Q.B.D. 394
Lopez v Geddes Refrigeration (1968) 10 JLR ?

BETWEEN JMM ATLANTIC LINE LIMITED DEFENDANT/APPELLANT

AND METAL BOX P. L. C. PLAINTIFF/RESPONDENT

Dennis Goffe & Lance Hylton for appellant

Respondent not represented

14th November &
1st December, 1988

CAREY, P. (Ag.):

The question which fell to be determined in this appeal was whether a judge could properly allow an amendment to a writ, the effect of which was to deprive a defendant of his right to claim the protection of a statute of limitation.

This case has had a rather chequered and unfortunate history which I must now set out. The plaintiffs, which we understand are an English company, by a writ dated October 22, 1984, sued Jamaica Merchant Marine Limited claiming -

> "..... US$23,706 as due and owing in respect of Cargo interests as per Bills of Lading K88 and K126 dated 9/10/83 respectively for cargo bulked in place on 'The Nikiforos' which was time chartered to the Defendant Company."

The statement of claim was entered on November 9, 1984. The defence was

filed May 10, 1985. By paragraph 3 of the statement of claim, the plaintiffs averred as follows:

> "The Defendant chartered the vessel 'Nikiforos' to convey cargo from the United Kingdom in October 1983 for discharge in Jamaica during the same month."

Paragraph 3 of the defence, denied that paragraph. The plaintiffs were not alerted by the tenor of the defence and indeed matters were allowed to slumber until September 10, 1986 when the plaintiffs filed a summons to add JMM Atlantic Line Limited as a defendant. The affidavit in support disclosed that "the Bills of Lading referred to in the Writ and "Statement of Claim show that they were issued by the JMM Atlantic Line "Limited, and Associate Company of the Defendant." The Master granted this amendment by an order dated October 10, 1986.

The added defendants then sought by a summons dated December 17, 1986 to have their name struck out of the writ and all subsequent proceedings. In their affidavit, the attorney-at-law for the defendants deposed, that by virtue of the Hague Rules incorporated under the Carriage of Goods Act and Clause 1 of the Bill of Lading made between the added defendant and the plaintiff, a limitation period of one year is imposed for the bringing of the action against the added defendant. Counter affidavits were put in wherein it was stated that the error was a genuine mistake and that both defendants have the same registered address, carry on business in the same office, have a common Company secretary, common directors and the same attorneys-at-law. Ellis, J., on 31st March, 1987 set aside the order of the Master dated October 28, 1986 which had joined JMM Atlantic Line Limited. The mountain had roared and produced a mouse: the plaintiffs had returned to their starting point. We understand that at the hearing before Ellis, J., the question of the effect of an amendment on the defendant's right to claim the umbrella of the limitation period was not debated.

Then on 9th April, 1987 the plaintiffs tried again. By an ex parte summons of that date, they applied to add or substitute

JMM Atlantic Line Limited as a defendant. Clarke, J. (Ag.), by an order of 1st June, 1987 substituted the present defendants and directed service of the writ and statement of claim on them. The defendants applied for an order to set aside the order of Clarke, J. (Ag.), on the ground which we must consider. The matter was heard by Reckord, J. (Ag.), on 27th July, 1987 and he reserved judgment until 1st October, 1987. He held - "that common justice demands that the limitation period should not be "invoked to deny the plaintiff the right to have his case tried in court." It is a matter of regret that the learned judge did not cite any authorities, although some were brought to his attention, nor make any effort to expose the process by which he arrived at his conclusion. For my part, I am quite unable to apprehend the meaning of "common justice". Justice requires that every man should get his due, and that must include a defendant. Howsoever that may be, the authorities do not support his conclusions.

This Court had to consider an analogous situation in Attorney General & Ors. v. Richards (unreported) S.C.C.A. 39/86 dated 9th March, 1987. The statute there involved was the Public Authorities Protection Act. The plaintiff claimed against the Attorney General and a police constable damages in an action for detinue and conversion. Section 33 of the Constabulary Force Act requires that in any action against a police constable, the averment must contain the words - "maliciously or "without reasonable or probable cause" and the plaintiff must prove that averment. That requirement had not been complied with and an application was accordingly made to strike out the writ and statement of claim as disclosing no cause of action. The learned judge declined to do so but 'suo motu' ordered that the statement of claim be amended.

In setting aside the judge's order, we said this at page 8:

> "The statutes of limitations provide legal defences and so we would ask what greater injustice could be done to a defendant than to find himself liable to defend a suit which is brought or continued contrary to the prevailing statute of limitation?"

The Court referred to a decision of the former Court of Appeal Charlton v. Reid [1960] 3 W.I.R. 33 where McGregor, C.J., pointed to a

number of authorities which shewed that the court has always refused to allow a cause of action to be added where, if it were allowed, the defence of a limitation statute would be defeated. One of the cases to which he referred was Weldon v. Neal [1887] 19 Q.B.D. 394. See the dictum of Lord Esher, M.R., at page 395 where he said this:

> "LORD ESHER, M.R. We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.
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> This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule. For these reasons I think the order of the Divisional Court was right and should be affirmed."

We were told that the respondent's counsel below relied on Order 20 Rule 5 (RSC) (U.K.), but the learned judge did not appear to base his decision on that Order: he did not refer to it. It provides as follow:

> "5.(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so."

In the event that he did, Lopez v. Geddes Refrigeration Ltd. [1968] 10 J.L.R., would be authority against that approach. That case also demonstrates the care with which editions of the Supreme Court Practice (The White Book) should be relied on in purported compliance with

Section 686 of the Civil Procedure Code. It is only necessary to advert to the words of Fox, J.A., who stated at page 560:

> "This would be sufficient to dispose of counsel's first submission, but it contains an even more fundamental misconception of the effect of the provision of O. 20, r. 5, para. 5 which cannot be ignored. We begin by pointing out that prior to the passing of the Rules of the Supreme Court 1965, the counterpart to ss. 259 and 677 were O. 28, rr. 1 and 12 respectively; now the counterparts are O. 20, rr. 5 and 8. The 1965 Rules "mark the culmination of the labours of several years undertaken to implement the strong recommendation of the Evershed Committee on Supreme Court Practice and Procedure made in their Second Interim Report in 1951 that 'a complete revision of the Rules be immediately put in hand'." (Preface to the first edition The Supreme Court Practice 1967, p.ix.) The preface goes on to point out that 'the former Rules have been revised, redrafted, rewritten, rearranged, recast, reworded, restated' (p. x); but that nevertheless, 'the new Rules make comparatively few substantial changes'. Three of these changes are contained in the provisions of O. 20, r. 5 which 'empower the Court to grant leave to amend the writ or pleading in the particular circumstances mentioned in paras. (3), (4) and (5) even though the application for such amendment is made after the expiry of any relevant period of limitation current at the date of the issue of the writ.' (The Supreme Court Practice 1967, Note 20/5-8/7 at p. 300.)
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> This modifies the former rule of practice to the effect that the court will not allow amendments which would deprive a defendant of a defence under the Statute of Limitations. So that now, in England, by virtue of para. 5, if the facts alleged in the amendment sought to be made are the same, or substantially the same as those alleged in support of a cause of action already pleaded, the court may allow the amendment after the expiry of any relevant period of limitation notwithstanding that the effect of the amendment will be to add or substitute a new cause of action. But the provisions of r. 5 do not affect or alter the practice of the English courts in cases outside the scope of the circumstances mentioned in paras. (3), (4) and (5). In such cases the unfettered discretion of the court to amend the writ, the pleadings, or any document in the proceedings is prescribed by rr. 5(1) and 8. Order 20, r. 5 applies therefore in a limited and precisely defined area, and is incapable of the general application and the effect for which counsel argued."

These reasons persuaded me that the learned judge fell into error for there was no warrant for the exercise of his discretion to allow the amendment. That must result in the order being set aside and as we announced at the hearing, we ordered as well, that the appellants should have the costs both here and below.

FORTE, J.A.:

I have had the opportunity of reading in draft the judgment of Carey, P. (Ag.), and have only to say that I am in entire agreement with the reasoning therein.

GORDON, J.A. (Ag.):

I have read the judgment of Carey, P. (Ag.). I agree with the reasoning therein and find there is nothing I can usefully add.