JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 115/05

PROCEDURAL APPEAL

BEFORE: **THE HON. MR. JUSTICE K. HARRISON, J.A.**

BETWEEN:	**THE JAMAICA RAILWAY CORPORATION**	**APPELLANT**
AND	**MARK AZAN**	**RESPONDENT**

IN CHAMBERS

Dave Garcia and Jerome Spencer instructed by Myers Fletcher and Gordon for the Appellant.

Garth McBean instructed by Knight, Pickersgill and Dowding for the Respondent.

February 16, 2006

K. Harrison, J.A:

Introduction

1. The matter before me is a Procedural Appeal filed on the 1st November 2005. It concerns an Order made by Daye J, dated October 20, 2005 whereby, the Claimant/Respondent was permitted to amend his Statement of Claim in

accordance with a Notice of Application filed October 10, 2005. The Attorneys at Law have submitted written submissions in accordance with the Court of Appeal Rules 2002.

The Judge's findings

2. The learned judge found that the amendment which was granted did not create a new cause of action but was simply, further particulars of the original claim brought by the Respondent in respect of an agreement for the sale of land between the parties. Accordingly, the learned judge held that the amendment would not deprive the Appellant of a defence under the Limitation of Actions Act.

3. The learned judge also found that the question whether the vendor's Attorney acted as agent or stakeholder on behalf of the parties was an issue that had to be determined at trial and not by a Judge in Chambers. Very interesting arguments have been raised by the Appellant in its response to the Respondent's submissions regarding this finding and will be dealt with in this judgment under ground of appeal (b).

The background to the litigation

4. The Respondent commenced Claim No. E 49 of 1993, in the Supreme Court. He alleged that an agreement in writing was concluded between him and the Appellant whereupon it was agreed that the Appellant would sell and the Respondent would buy 21,137 square feet of land being part of the land comprised in Certificate of Title registered at Volume 1221 Folio 436 for J$1,300,000.00.

5. The sale agreement was executed by the Respondent and Chairman and Secretary of the Jamaica Railway Corporation. Voche and Voche, Attorneys at Law, had the carriage of sale.

6. It is borne out by the facts that the Respondent paid a deposit of J$800,000.00 although it was pleaded that the deposit was $650,000.00. The parties have agreed however, that it was in fact $800,000.00 that was paid. The special conditions of sale clause state inter alia:

> "It is hereby understood and agreed that the Vendors Attorneys at Law shall be entitled to pay the stamp duty ... from the deposit and that if for any reason whatsoever the deposit has to be refunded to the purchaser, the purchaser shall to the extent of such stamp duty etc... be deemed to have been refunded same upon delivery to the purchaser of the originals transfer tax receipt and stamped agreement for sale duly noted by the Vendor's Attorneys at Law as cancelled."

7. At paragraphs 4 and 5 of the Statement of Claim the Respondent pleaded as follows:

> "4. The following was an express term of the agreement: "A deposit of Six Hundred and Fifty Thousand Dollars ($650,000.00) on the signing hereof balance on completion."
>
> "5. In pursuance of the agreement the Plaintiff paid the defendant sum of Six hundred and Fifty Thousand Dollars ($650,000.00) by way of deposit."
> (emphasis supplied)

8. The Respondent has contended that notwithstanding repeated requests by him, the Appellant has neglected and refused to take steps towards the

completion of the agreement for sale. He has also contended that the contract was breached. He has sought specific performance of the contract. In the alternative, he seeks damages for breach of contract.

9. On November 15, 2001, the Appellant filed its Defence and paragraphs 4 and 5 of the Statement of Claim (supra) were admitted. The Appellant alleged however that the agreement for sale was invalid and unenforceable because: (a) it failed to specify the portion of the land comprised in Certificate of Title registered at Volume 1221 Folio 436 that was intended to be sold; (b) it was expressly made subject to sub-division approval being granted by the St. Catherine Parish Council, and no such approval had been granted, and (c) a transfer of the land would require the approval of the Minster with responsibility for Transport and this approval was not given.

10. On October 10, 2005, the Respondent filed a Notice of Application in the Supreme Court and applied to amend his Statement of Claim pursuant to Part 20 of the Civil Procedure Rules, 2002 (the CPR). The application states;

(a) After paragraph 7:

> "(8) Further or in the alternative, the Claimant has not obtained title or ownership of the said property and as a consequence the consideration for the payment by the Claimant of the said deposit of $800,000 to the Defendant has wholly failed and the Defendant has therefore had and received the said sum to the use of the Claimant. "

(b) After paragraph 2 of the relief:

> "2(a) The said sum of $800,000 being money had and received by the Defendant to the use of the Claimant.

> 2(b) Interest on the said sum of $800,000 at a commercial rate of interest. "

11. The application to amend the Statement of Claim was opposed on the ground that a new cause of action was pleaded which was outside of the limitation period of six (6) years. On October 20, 2005, Daye J, however, granted permission to make the necessary amendments to the Statement of Claim.

The Grounds of Appeal

12. The grounds of appeal are set out hereunder:

> "(a) The learned Judge erred in his finding that the amendment sought by the Respondent did not constitute a new cause of action. "
>
> "(c)The learned Judge erred in finding that the issue, of whether an Attorney at Law acting for a vendor and purchaser in a contract for the sale of land (who has received a deposit from the purchaser) is a stakeholder, is an issue for a court at trial and not a Judge in Chambers."

13. I turn first, to the submissions with respect to ground (a). There is no dispute that the application to amend the Statement of Claim was made after the limitation period had expired. The relevant Rule for consideration therefore, is 20.6 of the CPR. This Rule provides that the amendment of a statement of case after the end of the relevant limitation period may be made where it is intended to correct a mistake as to the name of a party in a situation where the mistake is genuine and not one "which would in all the circumstances cause reasonable doubt as to the identity of the party in question". This Rule makes no provision for the substitution or addition of a new cause of action.

14. On behalf of the Appellant, it was submitted that Part 20.6 of the CPR unlike its English equivalent (Part 17.4 of the Civil Procedure Rules, 1998) does not permit the amendment of a statement of case in order to add a new cause of action after the expiry of the relevant limitation period. It was submitted that to permit otherwise, would embarrass and seriously prejudice a defendant by taking away a defence under the Limitation of Actions Act: ***Weldon v Neal*** (1887) 19 QBD 394 and ***Bowers v The Attorney General and Gordon*** (1991) 28 JLR 334.

15. The appellant agreed that the effect of the provisions in Rule 20.6 of the CPR is not to limit amendments after the expiry of the relevant limitation period, to the correction of mistakes which relate to the name of a party. Rather, it was said that amendments may be made to a party's statement of case after the expiry of a limitation period provided the amendment does not introduce a new cause of action. In this regard the appellant argued that the claim originally pleaded by the respondent was for breach of contract by the appellant. This was reflected both in the averments and the relief sought. As a consequence, the Respondent sought relief for specific performance of the agreement or damages. In the circumstances, it was argued, that the respondent's statement of claim clearly indicated that he intended to treat the agreement for sale between himself and the appellant as subsisting, but breached - not invalidated. It was also submitted that averments for breach of contract and that the respondent remains ready and willing to fulfill his obligations are inconsistent with a claim for

money had and received: ***Cargill v Bower*** (1878) 10 Ch D 502 at 508. In the circumstances, the Appellant submitted that the amendment sought when properly considered, introduced a new cause of action for money had and received 8 years after the expiry of the limitation period for the commencement of such a cause of action.

16. The Appellant further submitted that the claim for money had and received could not be saved by the prayer for "further relief" for the following reasons:

(a) there were no averments in the appellant's Statement of Claim to support such a claim; and

(b) the claim for money had and received is inconsistent with the appellant's claim for specific performance or damages in the alternative. In the absence of an allegation in the Statement of Claim as originally pleaded that the contract was rescinded the further and other relief sought could not have included a claim for money had and received.

17. On behalf of the Respondent, Mr. McBean submitted that he agreed with the Appellant that pleading a new cause of action outside of the limitation period would deprive the defendant of a legal defence. He submitted however, that the provisions of Part 20.6 of the CPR as it relates to amendments after the limitation period are not exhaustive for the following reasons:

(i) In relation to cases filed before the CPR came into effect the Courts in Jamaica like those in the United Kingdom have adopted a more liberal approach since the litigants in those cases were operating under a different regime. See ***Biguzzi v Rank Leisure plc*** [1994] 4 All E.R 934.

(ii) The Court ought to apply the overriding objective of dealing with cases justly and to interpret the rules liberally particularly in cases filed before the Rules came into effect.

18. Mr. McBean submitted that the amendments did not add any new cause or causes of action which could cause injustice or prejudice to the Appellant. He argued that the amendments arose out of and were based on facts already pleaded in the Statement of Claim which are: a) the Respondent had paid the required deposit under the agreement (paragraph 5 of the Statement of Claim); and (b) notwithstanding repeated requests by the Respondent the Appellant had neglected and refused and continues to neglect and refuse to take any steps towards completion of the agreement for sale (paragraph 6 of the statement of claim). The inevitable consequence or the inescapable inference from paragraph 6 as originally pleaded he said, is that the Respondent did not obtain title or ownership. He therefore submitted that by adding the new paragraph 8, it was

simply stating, what was the clear inference from paragraphs 5 and 6 of the Statement of Claim.

19. Mr. McBean further submitted that if the Court at trial were to find that there was no binding and enforceable contract, it could give relief by virtue of the claim for "further or other relief" and order a refund of the deposit to the Respondent. He submitted that it would seem unjust that a Court could give no relief under the heading 'further or other relief' where it is undisputed that $800,000.00 was paid as a deposit and no value was received in exchange.

20. I turn now to the submissions in respect of ground of appeal (b). The Appellant initially admitted in its Defence that the deposit was paid by the Respondent to the Appellant. However, on October 13, 2005, the day before the hearing of the Application to Amend the Statement of Claim, the Appellant filed an amended Defence that reads inter alia:

> "4. Paragraph 4 of the Statement of Claim is admitted.
>
> 5. Paragraph 5 of the Statement of Claim is denied, in answer thereto, the defendant will say that the money referred therein was paid to the Voche and Voche Attorneys at Law, who received the money as stakeholder. The defendant will say that it never received that money or part thereof, and has never benefited from the said money."
>
> (Emphasis supplied)

21. The Appellant submitted in the written submissions that the stakeholder issue is strictly one of law and early disposal of it by the Judge in Chambers, would save cost and time rather than delaying its determination until trial. The Appellant relied upon the authority of ***Wiggins v Lord*** (1841) 49 ER 30

explained in ***Edgell v Day*** (1865) 1 LR CP 80 and contends that repayment of the deposit remained solely the responsibility of the stakeholder.

22. Mr. McBean submitted on the other hand, that the question of whether Voche' and Voche' were stakeholders was not entirely a question of law because the relevant law could only be applied after evidence was given in examination in chief and cross-examination at trial as to the precise circumstances in which the money was paid and held by the Attorneys at Law.

23. Mr. McBean further submitted that the stakeholder issue was not pleaded in the original Defence but was raised for the first time in the amended Defence filed on the 13th October 2005. He argued that it was not until the day before the hearing of the application to amend that he was served with the amended Defence (supra). In these circumstances, he said, the Respondent did not have the opportunity to file a more detailed affidavit regarding the precise circumstances in which the money was paid and held by Voche and Voche.

24. In its response to the above submissions in paragraph 23 (supra), the Appellant submitted as follows:

> "....we respectfully submit that the learned Judge prematurely determined that Voche and Voche's capacity in relation to the deposit was one which could not be decided by a Judge in Chambers. However, that was not the subject of the application before the learned Judge and the judge should not, rightly, have made a finding thereon. The learned Judge was considering an application to amend the Respondent's statement of case. The issue of Voche and Voche's capacity in holding the deposit arose on the Respondent's application solely within the context of our argument that the Court should not grant an amendment which does not have any prospects of success (as the deposit was received by a stakeholder, it was the stakeholder who was liable

> to pay the deposit over to whichever party was ultimately entitled). Having formed the view (wrongly in our submission) that the amendment was appropriate, the learned judge ought not to have assumed, without evidence to support the assumption, that an open court trial of this direct issue was necessary. Instead, his Lordship should have gone no further than to permit the amendment, leaving it open for the issue to be dealt with as a preliminary issue (if indeed there is any further relevant evidence to be heard on it). Essentially the Court has granted an amendment and precluded a preliminary determination not based on evidence before it, but based on evidence that might, perhaps be adduced – without any indication that any such evidence to contradict that of the Appellant actually exists ..."
>
> (emphasis supplied)

The learned judge made his finding nevertheless as set out at paragraph 3 (supra). It is not clear however on reading the judgment what prompted him to make this finding.

Disposal of the issues

25. It has been the practice over the years that there is a general discretion to permit amendments where this is just and proportionate. The principle has always been that an amendment should be allowed if it can be made without injustice to the other side. See ***Clarapede and Co. v Commercial Union Association*** (1883) 32 WR 262.

26. For purposes of the Limitation Act, an amendment to add or substitute a new cause of action is deemed to be a separate claim and to have been commenced on the same date as the original claim. Consequently, if the original claim was commenced within the relevant limitation period, and an amendment is allowed adding a cause of action after the expiry of the limitation period, the

defendant will be deprived of the limitation defence, and will usually suffer injustice not compensable by an order for costs.

27. There is provision in CPR, r. 20.6, for a party who wishes to amend a statement of case in respect of a change of name after a period of limitation has expired. There is no provision however, in our Rules for the substitution or addition of a new cause of action after the expiration of the limitation period.

28. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management.

29. The authorities establish certain principles in relation to what amounts to a new cause of action. The following instances are set out but they are not exhaustive:

(i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In ***Lloyds Bank plc v Rogers*** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:

> "... if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts."

(ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new

remedy, there is no addition of a new cause of action. See ***Savings and Investment Bank Ltd v Fincken*** [2001] EWCA Civ 1639, The Times, 15 November 2001.

(iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.

(iv) In the case of ***Brickfield Properties Ltd. v Newton*** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment.

29. In the instant case it could not be said that a new cause of action has been added. One only has to compare the way in which the proposed amended paragraph 8 and the additional relief sought are pleaded to see how far the case

has changed. In my view no new facts are being introduced by the Respondent. He merely wishes to say that if the Appellant succeeds in establishing that in law, there was no valid contract between the parties, he should be able to recover his deposit. In those circumstances, to prevent him from putting that case before the court would impose an impediment on his access to the court which would require justification.

30. Of course, the learned judge in exercising his discretion whether or not to grant the amendment ought to consider the Respondent's prospects of success at the trial. The learned judge in expressing himself in his judgment said:

> "When I examine the pleadings I find that the defendants in their Defence (sic) accept paragraph 4 and 5 of the Claimant's claim that they (sic) paid a deposit and are (sic) entitled to it. They (sic) do not dispute that the claim of the unforseeability (sic) of the contract defeats the Claimant's right to the return of their (sic) deposit."

Conclusion

31. In sum, it is in my judgment, bearing in mind each of the concepts set out in CPR 1.1 as making up the overriding objective, that cases should be dealt with justly. The learned judge did not err in my view in granting the amendment. His finding that Voche and Voche's position, if they were stakeholders, was quite un-necessary since there was no application before him to decide on that issue. The Appeal is therefore dismissed with Costs to the Respondent to be taxed if not agreed.

32. There is one final observation which must be made before leaving this appeal. The trial of this matter is long overdue so, every effort should be made to expedite its hearing in the very near future.