

NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 51/94

**BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.**

**BETWEEN PHILMORE OGLE (Liquidator
appointed by Court for Jamincorp
International Merchant Bank Limited) - Appellant**

A N D JAMAICA CITIZENS BANK LIMITED -Respondent

Christopher Honeywell for Appellant

Michael Hylton Q.C. for Respondent

October 18, and December 5, 1995

PATTERSON, J.A.

This appeal is from an order of Walker, J. made on the 11th March, 1994, dismissing an application of the appellant(" the plaintiff") to "amend further amended statement of claim" in an action brought by the plaintiff against the respondent ("the defendant"). After hearing arguments on the 18th October, we dismissed the appeal, and in keeping with our promise, we now state our reasons for so doing.

The plaintiff is the legally appointed liquidator of Jamincorp International Merchant Bank Limited (In Liquidation) (hereinafter referred to as "the company"). At the time the company went into liquidation, it had on credit with the defendant the sum of

\$415,208.00. The plaintiff alleged that the company had another account with Jamaica Citizens Trust and Merchant Bank Limited with \$1,056,771.00 held on a certificate of deposit. During 1983, the company guaranteed to the defendant certain indebtedness of Antillean Food Processors Limited ("Antillean") to a total of \$700,000.00 with interest. On or about 28th October, 1986, the defendant, relying on guarantees the company had given, appropriated the entire balance it held in the company's account towards Antillean's indebtedness. The defendant also admitted receiving from Jamaica Citizens Trust and Merchant Bank Limited the proceeds of the certificate of deposit they held to the company's credit on the 28th October, 1986, and relying on guarantees, it applied that sum also towards Antillean's indebtedness.

The plaintiff filed a specially indorsed writ of summons on the 26th March, 1992 claiming a declaration that the defendant is not entitled to "set off" the proceeds of the certificate of deposit against the company's indebtedness to the defendant or "for any alleged liabilities of the company to the defendant for any debits (sic) owed or allegedly owed by Antillean Food Processors Limited", and for an order that the proceeds of the said certificate of deposit be remitted to the company's account. The plaintiff amended the statement of claim and eventually filed in December 1993 what was described as an "amended further amended statement of claim". It is that statement of claim which the plaintiff sought to amend. The application by way of a summons supported by an affidavit of the plaintiff, is intituled "Amended Summons to amend further amended Statement of Claim". The amendments sought firstly the insertion of a new paragraph ("Paragraph 11") in the pleadings. Basically, that paragraph contains allegations of fraud committed by the

defendant "in receiving and disbursing the company's money held on account with the Jamaica Citizens Trust and Merchant Bank Limited". The "particulars of fraud of defendant" are included. Next, it sought the deletion of the original reliefs claimed and that they be substituted by five claims which are quite different from the original claims.

The reasons for seeking the amendments are set out in the affidavit, and paragraphs 8 and 9 are of particular importance. They read as follows:

"8. That it was only with extreme diligence and painstaking searches and it was only upon enlisting the resources available to me as a senior partner in the accounting firm of Messrs. Touche, Ross, Thorburn & Co. that I was able to locate the information and documentation exhibited in my aforesaid Affidavit dated the 26th day of March 1992 at which point it became apparent that the Defendant's affiliate organisation Jamaica Citizens Trust and Merchant Bank Limited had fraudulently and in concert with the Defendant misappropriated the funds reposing in the company's account with Jamaica Citizens Trust and Merchant Bank Limited.

9. That it was only after the suit was filed herein and after extensive consultation with my attorneys that the aforesaid state of affairs was fully revealed and appreciated by me and I now humbly ask this Court that an Order be granted in terms of the Summons to Amend Further Amended Statement of Claim dated the day of March 1994 and filed herein."

Walker, J. would have none of it. In his judgment, he stated that from the authorities he had come to the conclusion that "the principle applicable in this case is that an amendment to pleadings ought not to be allowed if the effect of such an amendment

would be to deprive a party to the proceedings of a legal defence” and that such a principle “may not be departed from except under very peculiar circumstances”. He further said that he found “no prima facie evidence of concealment of fraud having been perpetrated by this defendant on the plaintiff, nor did he find any very peculiar circumstances to justify an exercise of the Court’s discretion in favour of the plaintiff”. He therefore dismissed the summons.

Before us, three grounds of appeal were urged. Two were argued together . They are these:-

“2. The learned judge erred in finding that there was no prima facie evidence of fraud and/or concealed fraud having been perpetrated by the defendant on the plaintiff

3. That the learned Judge erred in completely failing to adjudicate on the issue raised by the Plaintiff in the amended Summons concerning and in relation to the application to amend the Writ of Summons and Statement of Claim to name the claim for conversion which the Plaintiff had already pleaded all the essential elements in its prior pleadings.”

Mr. Honeywell argued these grounds with tongue in cheek. He expressed the view that the pleadings set out in paragraphs 2-10 of the statement of claim contained sufficient material “facts of allegations” to show that the defendant had dealt with the amount on credit for the company with the Jamaica Citizens Trust and Merchant Bank in a manner inconsistent with the plaintiff’s rights. However, no allegation of conversion was made in those pleadings, and therefore the real facts had not been pleaded and consequently, the pleadings had not crystallized in such a way as to inform the Court of the “substratum” of

the case. He conceded that the amendment which sought a declaration of conversion was not really necessary, but that it was desirable to "tidy up to include conversion". He complained that the learned judge did not adjudicate on or even mention the application to include conversion in the pleadings.

The pith and marrow of Counsel's contention is to be found in this ground:-

"1. The learned judge erred in finding that there are no peculiar circumstances in this case justifying an exercise of the Court's discretion to amend the Writ of Summons and Statement of Claim in favour of the plaintiff."

He expressed agreement with the general principle of law stated by the learned judge, but contended that on the facts and evidence disclosed in the several affidavits of the plaintiff, sufficient peculiar circumstances were raised, which, if properly considered, would have been enough for the judge to exercise his discretion in the plaintiff's favour. He admitted that the plaintiff was seeking the amendment to introduce a new cause of action, namely fraud, and that such an amendment would have the effect of defeating the protection offered to the defendant by the Statute of Limitations. He argued, nevertheless, that such a situation arose because of "peculiar circumstances." Firstly, the plaintiff's appointment as liquidator took effect on the 28th September, 1989, but the cause of action arose on the 28th October, 1986, some three years before the plaintiff's appointment. After the liquidator's appointment, there was a state of confusion concerning the disputed transactions between the defendant and the company. The defendant was unwilling to supply necessary information concerning the disputed transactions and intentionally misled the plaintiff as to the true nature of the transactions. This amounted to a fraudulent

concealment of facts and information by the defendant. He said these were "the peculiar circumstances resulting from a conspiracy of silence by the defendant which prolonged the misleading circumstances", and reasonable diligence would not have allowed the plaintiff to discover the state of affairs before the limitation period expired.

In our view, the settled rule of practice which governs the grant of an application to amend the pleadings in a case such as this is not in dispute, and we need not repeat it. An amendment granted on the 14th March, 1994 to add a new cause of action, would have operated to the prejudice of the defendant in that it would deprive the defendant of a right to claim the protection of the Statute of Limitations. However, the real issue which fell to be determined in this appeal was whether there were "very peculiar circumstances" which would empower the Court to allow such an amendment. Reliance was placed by the plaintiff on the dictum of Lord Esher M.R. in Weldon v Neal (1887) 19 Q.B.B.. 394 at 395:-

"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".

Of course, the dictum is obiter, and we were not pointed to any authority in which the "very peculiar circumstances" prevailed over the well established rule of practice that "amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments" (per Lord Esher M.R. in Weldon v Neal (supra).

We did not agree that the reasons advanced by Counsel are sufficient to constitute the "very peculiar circumstances" envisaged by Lord Esher M.R. The plaintiff's reasons

for the delay cannot be altogether accurate because is his affidavit in support of the summons, he referred to documentation which he said made it "apparent that the defendant's affiliate (sic) organisation Jamaica Citizens Trust and Merchant Bank Limited had fraudulently and in concert with the defendant misappropriated the funds reposing in the company's account with Jamaica Citizens Trust and Merchant Bank Limited." The documentation referred to were (1) letter dated October 28, 1986, from the defendant addressed to Antillean Food Processors Ltd. and copied to the company and (2) letter dated November 20, 1990 from the defendant addressed to the company, "Attention: Mr. Philmore Ogle". Those letters made it quite clear that the defendant had applied the sum of \$1,466,627.25 taken from the company's accounts with the defendant and with Jamaica Citizens Trust and Merchant Bank Limited, towards liquidating the debt created by Antillean Food Processors Limited. Copies of the security documentation ought to have been supplied to the company at the time of their execution.

In the event, from the material the plaintiff admitted he possessed, it was open to him to plead fraud if at the time the writ was filed on the 26th March, 1992, he was so minded. That would have been well within the limitation period. It is of interest to note that Lord Esher M.R. stated that it is "the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance" (see **Bentley v Black** 9 T.L.R. 580)

We concluded that the finding of the learned judge that there was "no peculiar circumstances" to justify the grant of the amendment was quite right. Accordingly, we

dismissed the appeal affirmed the judgment of the Court below, and ordered that the respondent should have the costs of the appeal.