

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

SUIT NO. C.L. 1991/S 163

BETWEEN PETER SALMON CLAIMANT
AND MASTER BLEND FEEDS LIMITED DEFENDANT

IN CHAMBERS

Marion Rose Green instructed by Marion Rose Green and Company for
the claimant

Yualande Christopher instructed by Grant Stewart Phillips and
Company for the defendant

October 9 and 26, 2007

APPLICATION TO AMEND PARTICULARS OF CLAIM, RULES 19.4,
20.4 AND 20.6 OF THE CIVIL PROCEDURE RULES, WHETHER
AMENDMENT STATUTE BARRED,

SYKES J.

1. The issue on this application is whether the amendments sought by
the claimant are statute barred. I shall give the history of the
matter.

The history

2. Mr. Peter Salmon, an employee of Master Blend Feeds Limited
("Master Blend"), alleges that on June 2, 1986 he injured his back
while working at Master Blend's factory because it failed to provide a
safe system of work. He also alleges that Master Blend failed to meet
its obligations under the Factories Act.

3. By writ of summons filed June 7, 1991, Mr. Salmon, launched his
claim for compensation. His statement of claim, filed on the same
date, has these particulars of injuries:

- a. muscle spasm in back;
- b. narrowing of the disc space in vertebral column;
- c. intervertebral disc prolapse;
- d. severe and continuous pain in lower back;
- e. inability to have sexual intercourse;

4. Mr. Salmon filed the claim within the six year limitation period. The claim, since its commencement, has had a long, tortuous and agonising journey which, mercifully, is nearing the end. The claim was filed under the old rules procedural rules (the Civil Procedure Code). Under the new rules, the Civil Procedure Rules of 2002 ("CPR"), the court is empowered to make orders to deal with claims justly and expeditiously. On February 21, 2005, a judge of this court, at case management, ordered:

1. Unless the claimant files all witness statements with all documents, receipts and reports including but not limited to medical reports (being relied on in support of his claim) in a sealed envelop and notify the defendant of this fact on or before the 29th July 2005 the claimant's claim is struck out.

2. If the claimant fully complies with paragraph 1 of this order then the defendant should file all witness statements with all documents, receipts and reports being relied on in support of its defence in a sealed envelope and notify the claimant's attorney on record of this fact on or before 28th October 2005.

5. Other orders were made but they are not relevant for present purposes. The claimant met the July 29, 2005, deadline. Thereafter time began for the defendant to comply with paragraph 2 of the order. Master Blend failed to comply with paragraph 2 of the order and its defence was struck out. Mr. Salmon applied for judgment on November 25, 2005. Judgment was entered and the matter set for assessment of damages. This assessment is to take place on November 2, 2007.

The amendments

6. Mr. Salmon applies, by notice of application for court orders dated October 31, 2006, for amendments to his particulars of claim. One amendment is claiming interest on the damages to be assessed. The other wishes to add more paragraphs to his particulars of injuries. These are:

- f. sudden sharp pains across the lower back;
- g. marked tenderness on palpation of the lower erector spinae muscles and along the midline of the lumbar spine;
- h. intermittent lower back pains which are aggravated by sitting for greater than one and a half hours, standing for greater than one and a half hours;
- i. pains across the lower back when lying in bed;
- j. anterior body osteophytes at the L5 vertebral body;
- k. chronic mechanical lower back pains

l. PROGNOSIS

The claimant will be plagued by permanent intermittent lower back pains which will be aggravated by activities of daily living such as prolonged sitting, standing and bending. Attempts at lifting heavy loads will also exacerbate the lower back pains.

7. Mr. Salmon desires to rely on two medical reports that were not among those filed on July 29, 2005. These are the reports of Dr. Karen Brighten and Dr. R. C. Rose.

The opposition

8. Miss Christopher fiercely opposes these amendments. Her position is simply, direct and clear. Her first submission is that the amendments are statute barred. Her second submission is that the amendments being sought are not permitted by the CPR. Her third submission is that under rule 8.7 (3) (a) of the CPR a claimant seeking interest "must say so in the claim form", to use the words of the rule. I shall expand on each submission as I assess them.

9. For her first submission, Miss Christopher relies on two cases: *Judith Godmar v Ciboney Group Limited* S.C.C.A. 144 of 2001 (delivered July 3, 2003) and *Gloria Moo Young v Geoffrey Chong* S.C.C.A. No 117/99 (delivered March 23, 2000). Both cases were decided under the Civil Procedure Code. I shall address the *Godmar* case first. Miss Christopher is saying that the law as it relates to amendments after the limitation period has expired has not changed and to that extent *Godmar* is still good authority.

10. In *Godmar*, the claimant applied to amend her statement of claim by adding further sums as special damages. She also wished to include a new claim for post traumatic stress disorder. Specifically, Miss Godmar alleged that the post traumatic stress disorder was an additional injury attributable to the defendant's negligence. The court allowed the additional special damages but disallowed the claim for post traumatic stress disorder. The court held that the additional sums for special damages were merely the cost of further treatment for injuries pleaded during the limitation period whereas the claim for post traumatic stress disorder was a claim for a new injury that was being made after the limitation period had passed.

11. I do not believe that Miss Christopher's submissions have taken sufficient notice of the distinction between disclosing more about an injury pleaded during the limitation period and making a claim for an injury which was not pleaded during the limitation period. This distinction seems to have been the underlying premise of the Court of Appeal in *Godmar*.

12. The claim in *Godmar* was in the tort of negligence. There was no issue of causation before the court. The court did not say that the post traumatic stress disorder could not be attributed to the defendant's tortious act. Smith J.A., who delivered the leading judgment of the court, held that a cause of action accrues when there was wrong doing by the defendant from which loss or damage is suffered by the claimant (see page 27). His Lordship stated quite emphatically that "the loss or damage or injury must be pleaded within the limitation period" (my emphasis) (see page 27). He added that time begins to run from the accrual of the cause of action and the authorities indicated "that this is so irrespective of the plaintiff's knowledge of such loss or damage". For the removal of doubt his Lordship stated at page 29:

In the instant case the wrongdoing from which the plaintiff/appellant alleges that she suffered the post traumatic stress disorder occurred on July 3, 1995. Accordingly, the cause of action accrued on July 3, 1995. The limitation period expired on July 2, 2001. The further amendment sought if granted, would allow the plaintiff to plead an injury long after the expiration of the limitation period. This in my view is not permissible in law. The court may not allow a plaintiff to amend by setting up a "fresh claim" in respect of a cause of action which since the writ would have become barred by statute ... (My emphasis)

13. For Smith J.A. the fact that the post traumatic stress disorder now sought to be pleaded after the end of the limitation period was caused by the initial wrongful act was unimportant. It would seem, therefore, that his Lordship draws a distinction between better particulars of a pleaded injury and pleading a new injury. The former would be permitted and the latter would not be once the limitation period has ended.

14. Miss Christopher also relied on the case of *Gloria Moo Young v Geoffrey Chong*. The circumstances of that case were quite different from the one before me. There the trial had commenced. Six witnesses had testified. The defendants sought an amendment which was an attempt to change their position to meet the evidence actually given by the claimants and their witnesses. In other words, the claimants were winning the contest and the defendants were adjusting their defence to meet the exigencies of the circumstances. The trial judge granted the amendment to the defendants. He was reversed by the Court of Appeal. Harrison J.A. described the amendments as "less than bona fide" (see page 10). Downer J.A. said that "the amendments ... presented an entirely new case, and therefore, were not made in good faith" (see page 49). His Lordship continued by saying that the "amendments granted in the court below are so fundamental that they amount to a new defence" (see page 59). The circumstances of that case are so far removed from the present one, that it could not be seriously contended (and Miss Christopher has not suggested) that Mr. Salmon is acting in bad faith. Mr. Salmon's assessment trial has not

begun. There is no evidence to suggest that Mr. Salmon is adjusting his claim to meet issues raised by Master Blend. This is sufficient to dispose of Miss Christopher's first submission.

15. Miss Christopher's second submission has raised an important concern about rule 19.4. She submitted that the CPR speaks to two and only two circumstances in which the court has power to amend a statement of case after the end of the limitation period. These two circumstances are set out in rules 19.4 and 20.6. According to her, the power to amend after the limitation period is an extraordinary power and so must be carefully exercised. She said that the power to amend after the limitation period has ended cannot be used as liberally as the power to amend during the limitation period. This led her to submit that rules 20.1, 20.2, 20.3 and rule 20.4 apply only to amendments before the limitation period has expired.

16. This submission requires an examination of the rules. Rule 19.4 (1) states that it applies to a change of parties after the end of a relevant limitation period. Under rule 19.4 (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.

17. Rule 20.6 (1) tells us that it applies to an amendment in a statement of case after the end of a relevant limitation period. Rule 20.6 (2) permits the court to 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.

18. From this, Miss Christopher deduced that it was not possible to accommodate Mr. Salmon's amendment because it did not fall within any of the two stated instances expressly authorised by the CPR. For good measure, Miss Christopher submitted that the court had no inherent power to grant the amendments.

19. These submissions highlight an important issue. It appears that the CPR is conferring a power to override an Act of 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). Despite the Court of Appeal of England and Wales's decision in *Morgan EST (Scotland) Ltd v. Hanson Concrete Products Ltd* [2005] C.P. Rep 23, which has since been doubted by another decision of the Court of Appeal (*Adelson v. Associated Newspapers Ltd* [2007] C.P. Rep. 40), 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.

21. The submission that the only amendments permitted after the end of the limitation period are those specifically mentioned in rules 19.4 and 20.6 ignores rule 20.4 in its current form. The submissions do not take account of the distinction made earlier between giving greater details of a claim made during the limitation period and claiming for an entirely new injury after the limitation period.

22. The amended rule 20.4 (amendments came into effect on September 18, 2006) confers powers of amendment on the court. Under the original rule 20.4 the court could not grant an amendment of a statement of case after the first case management conference unless it was necessary because of a change in circumstances which became known after the date of that case management conference (see *Campbell v National Fuels & Lubricants* Claim No. C.L. 1999/ C 262 (delivered November 2, 2004)). The amended rule 20.4 has removed this restriction. The amended rule has not laid down any precondition or stated any criterion for the exercise of the discretion. This means that the application of the rule is governed exclusively by the overriding objective.

23. In applying the overriding objective I have to take a multi-dimensional approach because that is what is required when considering rule 1.1 (2). Miss Rose Green submitted that once there is no injustice to the defendant then the amendment ought to be allowed. This approach is too narrow. Rule 1.1 (2) requires that more than injustice to the defendant is taken into account.

24. Applying the principles stated paragraphs 21 to 23 to the instant case, I conclude that Mr. Salmon, save for one injury, has merely given more details of the injuries he received. The one injury that appears to be new and will not be allowed is that described as "anterior body osteophytes at the L5 vertebral body". I therefore allow all the amendments sought in respect of the particulars of injuries except that relating to the osteophytes.

25. I come to the interest point. This action began under the old rules. Under those rules interest need not have been pleaded. The new rules use the word "must" in relation to claiming interest (see rule 8.7 (3)). Miss Christopher submitted that when this case came under the regime of the CPR the claimant should have amended his claim to ask for interest. She added that ignorance of the law is not an excuse. Therefore, she said, the claimant should have applied to amend his claim. Miss Christopher added that the claim for interest was statute barred. I do not agree with any of these submissions. Having regard to the nature of interest and its function I do not think that a claim for interest can be statute barred unless there is express legislation that says so. Limitation statutes do not bar a claim for interest because interest is neither a claim nor a cause of action. This is so because of the nature and purpose of interest in civil litigation.

26. Miss Christopher relied *Long Yong (Pte) Limited v Forbes Manufacturing* (1986) 40 W.I.R. 229, to establish the proposition that unless interest was claimed it does not form part of the judgment and if the limitation period has passed, then there cannot be any amendment to claim it. As far as the first aspect of this submission goes, the court held that where judgment was entered under section 70 of the Civil Procedure Code unless a claim for interest had been specifically pleaded then no interest can be included in the judgment entered. However, that did not prevent interest being awarded at the assessment of damages. According to Miss Christopher, this ability to

claim interest without it being pleaded changed by the new rules which require specific pleading of interest.

27. Having read the case, it seems to me that the case is not authority for the proposition that unless interest is claimed within the limitation period it is statute barred and cannot be claimed. The case held that interest need not be pleaded. Neither can the derived argument, namely, that the CPR now requires that interest be specifically claimed improve Miss Christopher's position. It would seem to me that if the juridical basis for awarding interest on general damages is to compensate the claimant for being kept of a capital sum and such interest cannot be known until it is judicially determined then it is permissible to grant an amendment to include the claim for interest. The discretion vested in the trial judge by section 3 of the Law Reform (Miscellaneous Provisions) Act is sufficient to address any perceived injustice to the defendant.

28. What is the nature of interest on damages? Let me begin by pointing out that the legislature, through section 3 of the Law Reform (Miscellaneous Provisions) Act, conferred a discretionary power on all courts of record to award interest on the judgment or debt or any part thereof. This provision is identical to Section 25 of the Supreme Court of Judicature Act 1962 (Laws of Trinidad and Tobago, (1980 edition) Chapter 4:01). Section 25 of the Trinidad statute was referred to by the Judicial Committee of the Privy Council in *Carlton Greer v. Alstons Engineering Sales and Services Limited*, an appeal from the Republic of Trinidad and Tobago, (Appeal No. 61 of 2001) (delivered June 19, 2003). In that case the defendant's counsel submitted that interest must be specifically pleaded because it was important for the claimant to know the nature of the claim he had to meet. That submission was rejected. The Committee approved of the decision of Hassalani J. in *De Souza v Trinidad Transport Enterprises Ltd and Nanan (No 2)* (1971) 18 WIR 150 who took the view that interest is not a cause of action. He accepted that interest was like costs - awarded if the claimant wins the case.

29. I now state the purpose of interest. It is now accepted that the purpose of interest on general damages is to compensate the claimant for being out of a capital sum since the date of the service of the claim form (see *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136; *Wentworth v. Wiltshire County Council* [1993] Q.B. 654, 668 - 669

per Stuart-Smith L.J.). The underlying idea is that the claimant may have to secure money from other sources to see about his injuries and welfare while he pursues compensation from the defendant. From this it is difficult to contend that a claim for interest is statute barred in the absence of specific a statutory provision to that effect.

30. Is there a risk that a claimant may delay bringing a claim in order to inflate damages? The courts have appreciated that some claimants may wish to escalate the award by delaying the action so that interest runs over a longer period than necessary. To counter this possibility, the courts have developed two effective antidotes. First, awarding a low rate of interest on damages (see *Birkett v. Hayes and Another* [1982] 1 W.L.R. 816, 821). Second, the court has the discretion to determine the period from which the damages attract interest. Indeed, any defendant who forms the view that the claimant has resorted to this objectionable practice may rely on the following passage from Watkins L.J. in *Birkett v Hayes* at page 825:

Far too often there is unjustifiable delay in bringing an action to trial. It is, in my view, wrong that interest should run during a time which can properly be called unjustifiable delay after the date of the writ. During that time the plaintiff will have been kept out of the sum awarded to him by his own fault. The fact that the defendants have had the use of the sum during that time is no good reason for excusing that fault and allowing interest to run during that time.

31. In light of my decision regarding the amendments, it would not be appropriate for me to comment on Mr. Salmon's conduct of the litigation and how that might affect the award of interest. These matters should be left for the assessment judge.

Conclusion

32. All amendments to the particulars of injuries are allowed except that which relates to anterior body osteophytes at the L5 vertebral body on the basis that the amendments give greater detail of injuries pleaded during the limitation period.

33. It has already been pointed out that interest is not a claim or cause of action. It is something on its own. Thus the question of interest becoming statute barred, as suggested by Miss Christopher, I would think is a legal impossibility in the absence of legislation barring a claim for interest. The proper way to deal with claims that seek to add a claim for interest is to grant the amendment and then the judge at the trial of the claim or assessment examines all the circumstances of the case and then awards an appropriate rate of interest for a specified period that he believes is appropriate. There are wide powers vested in the judge to do justice between the parties on the question of interest. Amendment granted to claim interest. Cost of this application to be costs in the claim.

