[2020] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 56/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**TIKAL LIMITED**	**1st APPELLANT**
AND	**WAYNE CHEN**	**2nd APPELLANT**
AND	**EVERLEY WALKER**	**RESPONDENT**

Submissions received from Nigel Jones & Co for the appellants

Submissions received from Vaccianna & Whittingham for the respondent

10 July 2020

MORRISON P

Introduction

[1] This appeal brings into question the power of the court to allow an amendment to add a defendant to a claim form and particulars of claim after the expiry of a relevant limitation period. It requires particular consideration of rules 19.4 and 20.6 of the Civil Procedure Rules 2002 ('the CPR'), which I will therefore set out at the outset.

[2] First, under the rubric, "Special provisions about adding or substituting parties after end of relevant limitation period", rule 19.4 provides as follows:

> "(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 were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that -
>
> (a) the new party is to be substituted for a party who 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."

[3] Second, under the rubric, "Amendments to statements of case after end of relevant limitation period", rule 20.6 provides that:

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

[4] The background to the question is as follows. In an action filed on 4 January 2012, the respondent claimed damages for negligence and breach of the Occupiers Liability Act against Super Plus Food Stores Limited ('Super Plus'). The claim arose out of a fall which the respondent allegedly suffered in supermarket premises in the Clock Tower Plaza, Half Way Tree, 11 Hope Road, on or about 21 February 2009. The respondent claimed that Super Plus owned, and or operated, and or occupied the supermarket; and that as a result of the fall she sustained injuries and suffered loss and damage.

[5] Almost four years passed between the filing of the action and the filing of a defence on behalf of Super Plus. During that time, the respondent entered judgment in default of acknowledgement of service against Super Plus. There were also inconclusive negotiations between the respondent's attorneys-at-law and Super Plus's insurers and attorneys-at-law with a view to settling the claim. In the end, Super Plus indicated its intention to contest the claim and the judgment in default of acknowledgment of service was set aside.

[6] In its defence filed on 16 December 2015, Super Plus denied that it was the owner or occupant of the premises situate at Clock Tower Plaza, denied the allegations of negligence against it and otherwise put the respondent to strict proof of her claim.

[7] By an order made on 9 August 2017, Master Rosemarie Harris ('the Master') granted permission to the respondent to amend the claim form and particulars of claim to add "Tikal Ltd t/a Super Plus Food Stores Ltd" and "Wayne Chen t/a Super Plus Food Stores Ltd" as the first and second defendants to the claim.

[8] Regrettably, the Master did not give written reasons for her decision. However, it appears to be common ground between the parties that she considered that (i) the court had the power to add a party or parties after the end of a limitation period; (ii) the respondent made a genuine mistake in naming Super Plus Food Stores Limited as the defendant; and (iii) the doctrine of estoppel, as applied by the Court of Appeal of England and Wales in **Wright v John Bagnall & Sons Limited**[1], enured to the respondent's benefit so as to bar the appellants from reliance on the limitation point.

[9] This is an appeal from the Master's order[2]. The issue on the appeal is whether she was right to make the order, particularly having regard to the fact that, by the time she did so, the limitation period for bringing action in respect of the alleged fall on 21 February 2009 had expired.

[10] The appellants contend that rule 19.4, which purports to make provisions for the addition or substitution of a party after the end of a relevant limitation period, is ineffectual for this purpose in the absence of any legislation permitting the court to disapply a limitation period in these circumstances. The appellants also urge that the

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[1] [1900] 2 QB 240
[2] The appeal is brought with the leave of this court granted on 25 May 2018.

Master erred in relying on the doctrine of estoppel as a ground for granting the amendments, since this was not a ground relied on by the respondent in making her application to add a defendant and, in any event, the doctrine was inapplicable in the circumstances of the case.

[11] The respondent contends that the case is governed by rule 20.6, in particular rule 20.6(2), which permits the court to allow an amendment to correct a mistake as to the name of a party, where the mistake is (a) a genuine one, and (b) "not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question"[3].

The application to add a defendant

[12] By notice of application filed on 26 October 2016, the respondent sought leave to amend the claim form and particulars of claim to (i) add Tikal Limited as a defendant; (ii) reflect Super Plus Food Stores Limited as 1st Defendant and Tikal Limited as the 2nd defendant; or (iii) in the alternative, reflect Tikal Limited T/A Super Plus Food Stores Limited as the defendant.

[13] In reliance on both rules 19.4 and 20.6 of the CPR, the respondent's stated grounds for the application were as follows:

> "1. …
>
> 2. …

[3] Rule 20.6(2)(b)

3. …

4. … The listing of Super Plus Foods Limited as a Defendant without Tikal Limited was a genuine error. The Claimant was unaware that Tikal Limited was listed as the registered owner of the premises and that Super Plus Foods Limited only occupied and operated their business on the premises owned by Tikal Limited.

5. No injustice will be caused to Tikal Limited if the Orders are granted, nor can there be an issue as to the identity of the party in question as Tikal Limited was at all material times the registered owner of the supermarket situated at Clock Tower Plaza, 11 Hope Road, Kingston 10, in the parish of St. Andrew and was trading as Super Plus Foods Stores Limited.

6. If the orders are not granted the Claimant, who has suffered and continues to suffer from the injuries sustained from a fall on the premises will be left without a remedy.

7. The claim cannot properly be carried on unless Tikal Limited is added as a defendant.

8. In letter dated 13th May, 2015, from Nigel Jones & Company to the Claimant's Attorneys-at-Law indicated that Super Plus Food Stores Limited has filed Notice of Application to set aside Default Judgment on 30th April, 2015. Prior to this, Super Plus Food Stores Limited has never denied being the occupier or owner of the premises situated at Clock Tower Plaza, 11 Hope Road, Kingston 10."

[14] The application was supported by the affidavit of Andreen Vanriel[4]. In so far as is now relevant, Ms Vanriel stated the following:

"5. The Claimant suffered injuries at the supermarket, identified by signage as a Super Plus Foods Store, and situated at Clock Tower Plaza, 11 Hope Road, Kingston 10,

[4] Sworn to on 26 October 2016

in the parish of St. Andrew on 21st February, 2009, and initiated a claim against said Super Plus Food Store first on 2nd September, 2011 and then again on 4th January, 2012.

6. Judgment in Default of Acknowledgment of Service was granted on 9th May, 2012, against Super Plus Food Stores Limited and the matter was set down for Assessment of Damages ...

7. The Defendant has taken steps to defend the claim. By letter dated 5th September, 2013, from Super Plus Food Stores Limited then Attorneys-at-Law, indicated that the Defendant was minded to make an offer to settle the matter. Further on 4th November, 2014, a notice of Appointment of Attorneys-at-Law filed by Nigel Jones & Company indicating that same attorneys-at-law were retained by the Defendant. On the 7th November, 2014, Nigel Jones & Company wrote to the Claimant's Attorneys-at-Law regarding adjourned hearing date for Assessment of Damages. …

8. By letter dated 13th May 2015 from Nigel Jones & Company, the Defendant's said Attorneys-at-law, informed the Claimant's Attorneys-at-law that Super Plus Food Stores had filed a Notice of Application to set aside Default Judgment on 30th April, 2015. …

9. As at 30th April, 2015 the Defendant for the first time is saying that the Claimant has sued the wrong party. Prior to this Super Plus Food Stores Limited has never denied being the occupier or owner of the premises situated at Clock Tower Plaza, 11 Hope Road, Kingston 10, at the time of the accident. In that application Super Plus Food Stores claim that Tikal Limited was the owner of the premises and ought to have been sued.

10. The Requested amendment is not seeking to bring a new cause of action nor will it affect the pleadings.

11. The listing of Super Plus Foods Limited as a Defendant without Tikal Limited was a genuine error. The Claimant was unaware that Tikal Limited was listed as the registered owner of the premises and that Super Plus Foods Stores Limited only occupied and operated their business on the premises owned by Tikal Limited.

12. In letter dated 13th August, 2009, from Advantage General Insurance Company Limited to the Claimant's then Attorneys-at-Law, Mrs. Margaret E. Myers, the Insured is identified as Tikal Limited T/as Super Plus Food Stores. …

13. Attached … are letters respectively dated 12th April, 2011, and 2nd May, 2011 and 19th May, 2011 between Advantage General Insurance Company Limited and the Claimant's Attorneys-at-Law. These letters were exchanged in an attempt at settling the Claimant's claim.

14. No injustice can be caused to Tikal Limited if the Orders are granted, nor can there be an issue as to the identity of the party in question as Tikal Limited was at all material times the registered owner of the supermarket situated at Clock Tower Plaza, 11 Hope Road, Kingston 10, in the parish of St. Andrew and was trading as Super Plus Food Stores Limited.

15. If the orders are not granted, the Claimant, who has suffered and continues to suffer from the injuries sustained from a fall on the premises will be left without a remedy. The injustice that would be caused to the Claimant is patent and ought not [sic] be allowed to happen.

16. The time for bringing a claim against Tikal Limited has ran [sic] and expired in February, 2015.

17. The addition of Tikal limited is necessary as the claim cannot properly be carried on unless Tikal Limited is added as a Defendant, as same was the owner of the premises at all material times.

18. At the time of the incident Super Plus Food Stores Limited, the Defendant herein, was operating its business and was therefore responsible for the lawful visitors to the premises."

[15] By an amended notice dated 3 July 2017, the respondent also sought to add Mr Wayne Chen, a director of Super Plus, as a defendant to the action. Though nothing in

particular now turns on it, I note in passing that the appellants contend that the amended notice was never served on them, nor was it supported by any affidavit.

The grounds of appeal

[16] The appellants' grounds of appeal are as follows:

> "i. The Master erred insofar as she failed to have regard and/or apply her mind to fact the Limitation Act has not been amended to provide the court with the power to add parties after the end of a limitation period and therefore the Civil Procedure Rules 2002 cannot override an Act of Parliament.
>
> ii. The Master erred insofar as she failed to accept the ruling of the Supreme Court that there is no extension of a limitation period allowed in Jamaica as this power has not been expressly conferred by an Act of Parliament or the amendment thereof.
>
> iii. The Master erred insofar as exercising her discretion to grant permission to allow the Respondent to add the parties to the claim by misapplying the overriding objective and as a consequence, failed to consider that such addition is unjust as it (i) would strip the proposed Defendants of its statutory defence and (ii) is not within the power of the court to do so as an Act of Parliament does not allow for such.
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> iv. The Master erred in applying the doctrine of estoppel arising from ***Wright v John Bagnall & Sons Ltd [1900] 2 Q.B***. as the circumstances were not similar to/or applicable to the present case.
>
> v. The Master erred in making an Order based on a finding of estoppel in circumstances where this ground was not included in the Claimant's Application to Add Defendant as required by Rule 11.7 (1)(b) of the Civil Procedures Rules 2002 and in circumstances where an order was not made pursuant to Rule 26.9 (3) of the Civil Procedure Rules to put the matter right.

vi. The Master erred by making an Order on her own volition that the Defendants were estopped from relying on the expiration of the limitation period of the Claim as their defence and failed to give the Defendants' Attorneys-at-Law an opportunity to respond as required by Rule 26.2(2) of the Civil Procedure Rules 2002.

vii. The Master erred insofar as she found that Claimant established on their case that they made a genuine mistake in naming the Defendant as Defendant in the Claim eight (8) years after the incident occurred despite being able to easily ascertain the correct parties to be named in the mater.

viii. The Master erred insofar as she permitted the Claimant to add the 2nd Appellant as a Defendant to the proceedings without evidence in support of the Application."

The submissions

[17] I trust that I do no disservice to the appellants' detailed written submissions[5] by summarising them in this way:

(a) Rule 19.4 cannot avail the respondent in this case as, unlike in the United Kingdom, the Limitation of Actions Act has not been amended to permit the court to extend the limitation period for actions for the tort of negligence. For this point, the appellants relied on a number of decisions in the Supreme Court to the same effect and submitted that the Master erred in assuming a power in the court to add defendants in a case in which the limitation period had already expired (grounds i, ii and iii).

[5] 1st and 2nd appellants' written submissions dated 6 June 2018

(b) The facts of **Wright v John Bagnall & Sons Limited**, in which the respondent was held to be estopped by conduct from relying on a statutory limitation period, were completely different from the facts of this case. The learned Master's reliance on the decision was therefore misplaced. Further, the respondent did not include estoppel as a ground for adding a defendant in the application, as she was obliged to do by virtue of rule 11.7(1)(b) of the CPR. And, further still, the Master erred in determining the point without first giving the appellants an opportunity to respond, as rule 26.2(2) also obliged her to do (grounds iv, v and vi).

(c) There was no basis for the Master's finding that the respondent's naming of Super Plus as the defendant to the action was made by mistake (ground vii).

(d) The respondent provided no evidence in support of the application to add Mr Chen as a defendant to the action (ground viii).

[18] In response[6], the respondents made three broad submissions:

(a) The application to add a defendant did not involve any question of extending the limitation period, nor did it involve the adding of a party. The respondent's intention from the outset was to sue the

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[6] Respondents written submissions dated 20 June 2018

owners, occupiers and/or operators of the Super Plus Food Stores supermarket in Clock Tower Plaza and the application was therefore made under rule 20.6 to correct a genuine error in the name of the defendant. There was no confusion as to the true identity of the defendant, as is clear from the fact that negotiations were underway at one stage involving the defendant's insurers and attorneys-at-law. The amendment which the Master granted did not amount to the addition of an unknown new party, but merely involved the correction of the defendant's name. The correct party was always before the court, albeit by the wrong name, and as such the order which the Master made could have caused the appellants no real prejudice, as opposed to the prejudice which the refusal of the order would have caused the respondent.

(b) The doctrine of estoppel as applied in **Wright v John Bagnall & Sons Limited** was not fact specific, but had to do with the conduct of the party who was held to be estopped. As in that case, the appellants' conduct of the case was unconscionable and it would therefore be unfair to permit them to rely on a limitation defence.

(c) An amended application for court orders was not to all intents and purposes a new application and it was therefore open to the

applicant, the respondent in this case, to rely on the affidavit originally filed in support of the application.

Discussion and analysis

[19] I will consider the issues raised by the appeal under the following headings:

1. Does rule 19.4 apply?

2. Does rule 20.6 apply?

3. What is the effect of **Wright v John Bagnall & Sons Limited**?

4. Was the application to add a defendant properly grounded in accordance with the provisions of rule 11.7(1)(b)?

Does rule 19.4 apply?

[20] I have already set out rule 19.4 in full. As has been seen, it permits the court to add or substitute a party after the end of a relevant limitation period if (a) the proceedings were started within the limitation period, and (b) the addition or substitution of the party is necessary.

[21] The limitation period for actions for negligence in this jurisdictions is six years. As Rowe P stated in **Lance Melbourne v Christina Wan**[7], after an extensive review of the relevant legislative history –

[7] (1985) 22 JLR 131, 135;

> "… there is for Jamaica a rigid rule that actions for negligence must be brought within a period of six years from the time the cause of action arose and any failure so to do will render the action statute barred."

[22] By its clear terms, rule 19.4 pre-supposes an existing power to add or substitute a party to an action which is already in train after the expiry of the relevant limitation period. But, as Sykes J (as he then was) explained in **Peter Salmon v Master Blend Feeds Limited**[8], this is problematic:

> "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) … 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."

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[8] (Unreported), Supreme Court, Jamaica, Suit No CL 1991/S 163, judgment delivered 26 October 2007, paras 19-20, and **Bartholomew Brown and another v Jamaica National Building Society** [2010] JMCA Civ 7, para. [40]

[23] Statements to like effect may be found in (i) **Shaun Baker v O'Brian Brown and Angella Scott-Smith**[9], in which Edwards J (as she then was) concluded, again after a detailed review of the legislative history and existing provisions, that "there is no discretion to extend time under the Statute of Limitations … or the Civil Procedure Rules 2002"; and (ii) **Shawna Williams v Garry Gilzene et al**[10], in which Simmons J stated that "there is no provision which is similar to the 1980 UK Act which supports the judicial extension of the limitation periods prescribed by [the] legislation".

[24] I entirely agree with these dicta. 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**[11], 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

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[9] (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 5631, judgment delivered on 3 May 2010, at para 72
[10] [2012] JMSC CIVIL 72, para. [24]
[11] [2008] UKPC 6, para. 19

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"[12].

[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.

Does rule 20.6 apply?

[27] Rule 20.6 provides that the court may allow an amendment in a statement of case after the end of a relevant limitation period to correct a mistake as to the name of a party, 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.

[28] So the question which now arises is whether this was a fit case for the exercise of the Master's discretion to correct the name of a party, that is, Super Plus, under this rule.

[29] As examples of the rule in action, the respondent referred us to the decision of the Court of Appeal of England and Wales in **Gregson v Channel Four Television Corporation**[13], **Elita Flickinger (Widow of the deceased Robert Flickinger) v David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club &**

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[12] Per Brandon LJ in **Liff v Peasley and Another** [1980] 1 All ER 623. 639; see also **Mabro v Eagle Star and British Dominions Co Ltd** [1932] All ER Rep 411, per Scrutton LJ at page 412 and per Greer LJ at page 413

[13] [2000] EWCA Civ 214

Cottages Limited[14], a decision of Sykes J, and **Grace Turner v University of Technology**[15], a decision of this court.

[30] In **Gregson v Channel Four Television Corporation**, the claimant issued a claim form claiming damages for libel against 'Channel Four Television Corporation Limited'. This was a dormant, wholly owned subsidiary of 'Channel Four Television Corporation', the intended defendant. When the error was discovered, the judge in the court below granted the claimant's application to correct the name under rule 17.4(3) of the English CPR, which is the equivalent of rule 20.6. The Court of Appeal considered that he was right do so: it was clear that the misnaming was a genuine mistake as to the name of the defendant and not one that would cause reasonable doubt as to its identity.

[31] In **Elita Flickinger**, having initially sued 'Xtabi Resort Club & Cottages Limited', the claimant applied to the court under rule 20.6 for permission to amend the name of the defendant to 'Xtabi Resort Limited'. The basis of the application was that the incorrect name had been used in error. Sykes J stated[16] that "[t]he distinction between misnaming and misidentification is crucial and fundamental to the resolution of this application". After a careful review of both rules, he concluded that rule 19.4 covered cases of misidentification while rule 20.6 had to do with cases of misnaming. Having considered a number of English authorities in which the extent of the court's

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[14] (Unreported), Supreme Court, Jamaica, Suit No CL F 013/1997, judgment delivered 31 January 2005
[15] [2014] JMCA Civ 24
[16] At para. 17

jurisdiction under both rules was canvassed[17], Sykes J concluded that the test of whether the particular case was one of misidentification or misnaming fell to be determined by the intention of the party who made the mistake. In the light of the affidavit evidence presented on both sides on the application, he concluded[18] that the amendment sought in this case was "not a change of parties but a change of name … no one could reasonably doubt who was the intended defendant". The application to amend was accordingly granted as prayed.

[32] In **Grace Turner v University of Technology** (after the expiry of the limitation period), the claimant was allowed to amend its name as it appeared in the claim form from 'University of Technology' to 'University of Technology Jamaica'. This court upheld the learned Master's decision to allow the amendment to stand. As Harris JA explained[19]:

> "There is clearly no mistake as to the identity of the respondent. There was no other entity referable to the amended name of the respondent, and the appellant, being an employee of the respondent, would have been fully cognizant of this. There is little doubt that the respondent was the party which intended to bring the action in its name. No prejudice would have been occasioned by the amendment. The respondent had a right to bring the claim. In all the circumstances of the case it cannot be said that either the claim or the amendment to the claim form was an abuse to the court's process. The court was, therefore, entitled under rule 20.6, to allow the amendment to stand."

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[17] Including **Gregson v Channel Four Television Corporation**
[18] At para. 41
[19] At para [29]

[33] The common thread that runs through these decisions, as it seems to me, is a clear and, if I may say so, relatively harmless error as to the identity of a party. Applying Sykes J's, as always, insightful classification, they were plainly cases of misnaming rather than misidentification.

[34] On the facts of this case, I accept that the respondent clearly intended to sue the owners, occupiers and/or operators of the Super Plus supermarket in Clock Tower Plaza. However, by her order, the Master did not sanction any correction in the name of Super Plus Foods Limited as a means of giving proper effect to that intention. Instead, by the clear terms of the order, what the Master did was to allow an amendment to include 'Tikal Ltd t/a Super Plus Food Stores Ltd' and 'Wayne Chen t/a Super Plus Food Stores Ltd', as additional defendants to the action. So this was not, as the respondent contended, the mere correction of a name, as in the other cases. Rather, it was the addition of defendants after the expiry of the limitation period, in breach of the well-known general rule. At the end of the day, therefore, rule 20.6 did not come into play at all in this case.

What is the effect of **Wright v John Bagnall & Sons Limited**?

[35] I will first state the facts of the case. The appellant received personal injuries arising out of and in the course of his employment to the respondent. Within days of being injured, his wife was told by the respondent to bring in a certificate from the hospital as to her husband's condition within three weeks, "when he would be due for compensation," and she would receive half his wages. At the end of the three weeks,

his wife went to the works and received an amount representing 50% of his weekly wage. This sum continued to be paid weekly by either the respondent or its insurance company for nearly a year. But at that point negotiations for a permanent settlement, which had been ongoing over the period, broke down and the payments ceased. The appellant then filed a request for arbitration in the county court under the Workmen's Compensation Act 1897, but was met by an objection from the respondent that the proceedings were out of time, the claim for compensation not having been made within six months from the date of the accident, as required by section 2(1) of the Act.

[36] On appeal, it was held that section 2(1) was not necessarily an absolute bar to proceedings for the assessment of compensation commenced after six months by an injured workman, and the county court judge or other arbitrator had jurisdiction to inquire whether there were any circumstances in the case to debar the employer from raising that defence. An agreement arrived at between the parties shortly after the accident that there was a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, was evidence upon which the judge or arbitrator may properly find that the employer was estopped from setting up the defence that the request for arbitration was not filed within six months of the accident.

[37] Delivering the leading judgment in the Court of Appeal, Collins LJ, having reviewed the facts, observed[20] that -

> "… there was ample evidence of an agreement that compensation was to be paid, the only question left open being that of amount. If that is the case, the respondents are debarred from raising the point that the statutory limitation applied. In my opinion they have also debarred themselves from raising this point by treating the matter as open to negotiation during the whole time in which they were paying the appellant, and, having allowed the six months to expire while the negotiations were still proceeding, they cannot then turn round and say that the time for claiming compensation has gone by. In my opinion there is ample evidence on which the county court judge might find that the respondents are not entitled to raise the defence of the lapse of the six months, and there is nothing in point of law to prevent him from so finding. The case must therefore go back."

[38] In a brief concurrence, Vaughan Williams LJ added[21] that –

> "… the result of the evidence is that there was an agreement that the respondents were to be liable to pay compensation, and that if the parties could not agree as to the amount they must go to the Court to have it determined. I think the lapse of time cannot be set up as a bar to the claim."

[39] The decision in **Wright v John Bagnall & Sons Limited** therefore demonstrates that, in certain circumstances, a defendant may be estopped from

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[20] At page 244
[21] At pages 244-245

raising a limitation defence by conduct which has led the prospective claimant to believe that the defendant will not be taken.

[40] But each case must, as it seems to me, turn on its own facts. It was clear from the evidence in **Wright v John Bagnall & Sons Limited** that the respondent had accepted its liability to the appellant and that the only question outstanding between the parties had to do with quantum. In the instant case, there was absolutely no evidence of anything approaching a concluded agreement between the appellants and the respondent as to liability and I therefore agree with the appellants that, on the facts of the case, the issue of estoppel simply did not arise.

[41] The appellants' further point was that the Master erred in taking the estoppel point, which the respondent did not mention in the application to add a defendant, of her own motion and without first affording them an opportunity to respond to it. Under rule 26.2(1), the court may, in the absence of any contrary provision, exercise its powers on an application or of its own initiative. But rule 26.2(2) makes it clear that where the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations, while rule 26.2(3) provides that such representations may be made in writing, telephonically "or by such other means as the court considers reasonable".

[42] In taking the estoppel point of her own initiative, the Master did not comply with the requirements of rule 26.2(2). In my view, therefore, the appellants' further point is also well taken.

Was the application to add a defendant properly grounded in accordance with the provisions of rule 11.7(1)(b)?

[43] The appellants' complaint on this point has to do with the fact that the respondent did not include estoppel as a ground for adding a defendant in the application.

[44] Rule 11.7(1)(b) provides that an application for court orders must state "briefly, the grounds on which the applicant is seeking the order".

[45] This complaint is obviously related to the point relating to the respondent's non-compliance with rule 26.2(2) and, in my view, it is as equally well taken. Although it might obviously have been possible for the breach of rule 11.7(1)(b) to be forgiven by an appeal to the court's general power to rectify matters in cases of procedural error under rule 26.9, it does not appear that any such application was made or granted in this case.

Conclusion

[46] For the reasons which I have attempted to state, my conclusions are that (i) the Master had no jurisdiction to add the appellants after the expiry of the limitation period in this matter, there being no statutory sanction for the making of such an order; (ii) the application to add a defendant did not fall under rule 20.6, since, rather than seeking the correction of an error, it called for the addition of a party; (iii) on the facts of this case, it did not fall under the principle applied in **Wright v John Bagnall & Sons Limited**; and (iv) the application to add a defendant was not in compliance with rule 11.7(1)(b).

[47] In light of these conclusions, I think that the appeal must be allowed and the orders of the Master set aside. Failing an application by the respondent for a different order within 14 days of the order on this appeal, I would award the appellants their costs on the appeal, such costs to be taxed if not agreed.

BROOKS JA

[48] I have had the opportunity of reading, in draft, the judgment of the President. I agree with his reasoning and conclusion that the appeal must be allowed and the orders of the learned Master set aside.

PUSEY JA (AG)

[49] I have read the draft judgment of the President and agree with his reasoning and conclusion. There is nothing I wish to add.

MORRISON P

ORDER

Appeal allowed. The orders of Master Harris set aside. Failing an application by the respondent for a different order within 14 days of the date hereof, costs to the appellants to be taxed if not agreed,