

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. W126/1996

BETWEEN	NEVILLE WRIGHT	PLAINTIFF
A N D	NATIONAL COMMERCIAL BANK JAMAICA LTD.	1 ST DEFENDANT
A N D	DANIEL MELVILLE	2 ND DEFENDANT
A N D	ARNOLD BERTRAM	3 RD DEFENDANT

Mr. Oswald James and Mr. O Terrelonge
for plaintiff

Mr. Robinson and Mrs. Priya Levers for
Defendants

Heard: 24th and 25th July, 2001 and 5th February, 2002

CAMPBELL, J

On the 31st May, 1991, Mr. Neville Wright, issued a Writ of Summons and Statement of Claim, in which he sought certain declaratory orders and consequential relief against the National Commercial Bank (NCB).

On the 18th January, 2001, the plaintiff filed a Summons for leave to Amend Writ of Summons and Statement of Claim by adding Second and Third Defendants, Arnold Bertram and Danny Melville respectively.

Reckord, J, granted leave to Amend the Summons, on the 18th June, 2001.

Subsequently, Conditional Appearance was entered on behalf of the Second and Third Defendants, “without prejudice” to an application being made to strike out the plaintiff’s claim against the Second and Third Defendants.

On the 8th July, 2001, the Second and Third Defendants applied by Summons for leave for the action against them to be dismissed or struck out as disclosing no reasonable cause of action, and as being frivolous and vexatious, and an abuse of the process of the Court.

On the hearing of this Summons a document entitled An Amended Writ of Summons and Statement of Claim, was presented by the plaintiff. This document was filed on the 13th July, 2001. The Defendants attorney objected to the Amendment on the ground that leave was necessary for such an Amendment and there was no evidence of such an order being granted. The Amendment was allowed, in order to facilitate the determination of the real question in controversy before the Court.

The note to the annual practice of Supreme Court (U.K.), O.20 r.5 states, at page 454:

*“It is the guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings (see Jenkins, C.J. in **G.L. Baker Ltd. v. Medway Building & Supplies***

[1958] 1 W.L.R. page 1231)".

The Court has an unquestioned discretion to allow a party to file an amended pleading in the absence of leave being granted.

In Overton C. Hutchnison vs. Ellis, Victor Shepherd (Executor of the Estate of Jula Burgher, deceased) 1991 28 J.L.R at page 194,

Morgan, J.A. said:

"Section 191 of the Code and the inherent jurisdiction of the Court on which the appellant relies, in my view does not fetter a Judge in granting liberty to a party to file an amended pleading even where no application for leave to amend is before the Court. The principle in the power to amend is primarily to see that the controversy between the parties comes to an end and it would be wholly unfair to drive away a party from the judgment seat if there is an arguable case or if an amendment would enable the party to maintain the action".

Mr. Robinson, for the defendants in arguing for the dismissal of the Plaintiff's action in respect of Second and Third Defendant submitted:

- (i) that the Plaintiff's case concerned the guarantees and mortgages that had executed in favour of N.C.B in order to secure loans granted to the Plaintiff and to Electronic Amusement Company Ltd (the Company) in which the Plaintiff held 30% of the shares along with the Second and Third Defendants.

- (ii) that there was no basis or foundation alleged in the Statement of Claim to grant the relief sought from the Second and Third Defendants.

Those reliefs were:

- (a) Joint and several indemnity from both the Second and Third Defendants who are jointly and severally liable to the First Defendant.
- (b) Further on in the alternative if the Plaintiff is found To be indebted to the First Defendant the Plaintiff claims indemnity and contribution from the Second and Third Defendant both of whom are jointly and severally liable to the First Defendant.
- (iii) That the entire Statement of Claim makes no allegation of any wrong doing against the Second and Third Defendants. Even if, the Plaintiff prove all he alleges, he would be unable to evidence a contract between the Plaintiff and the Second and Third Defendants. Similarly, the Plaintiff could not prove a duty of care owed by the Second and Third Defendants to the Plaintiff, and certainly could not prove a breach.

- (ii) That the only paragraphs in the Statement of Claim that any claim or a cause of action could be laid was in paragraphs 4, 6, 8 and 9 and there was nothing in those paragraphs that allege a cause of action.

It was common ground that the relevant paragraphs for the purpose of the application were paragraphs 4, 6, 8 and 9.

Paragraph 4 Describes the Plaintiff as being partners in a joint enterprise i.e. the company to which the First Defendant provided a loan, secured by the Plaintiff's guarantee and mortgage. Partners and shareholders in a limited liability company such as Electronic Amusement Co. Ltd., have distinct liabilities in respect of the debts of their respective organisation. The liability of members in a limited liability company is restricted to the amount unpaid on their shares. On the other hand in a partnership, the liability is unlimited, except in the case of a limited partnership and even then there must be one general partner with unlimited liability. It follows therefore, that any liability the Second and Third Defendants would have as shareholders would be on the demand of the Company, which is not a party to the action.

Paragraph 6 Alleges that when the Plaintiff tendered his mortgage #863823 he was under the mistaken belief that it was only to secure his

indebtedness at a specific branch of the First Defendant. The mortgage was used by the First Defendant to secure the Plaintiff's guarantee to Electronic Amusement Ltd., in which the Plaintiff was a 30% shareholder along with the Second and Third Defendants. There is no conduct of the Second and Third Defendants that could be impugned.

Paragraph 8 States that the guarantee of the Plaintiff was signed at the Second Defendant's office. This latter statement is innocuous. The Second Defendant is alleged as informing the Plaintiff of the need to such financing to provide slot machines and equipment for the company, most importantly, is the Plaintiff's statement 'that Jeffrey Cobham, managing director of the First Defendant advised the Plaintiff, that the Second and Third Defendants would give similar guarantees for this loan. It should be noted that there is no allegation that similar guarantees have been signed although the Defendants pleadings on the record categorically state that the Second and Third Defendants have signed similar guarantees.

The guarantee executed by the Plaintiff dated 21st March, 1991, states at paragraph I:

"In consideration of your giving time credit and /or banking facilities and accommodation to Electronic Amusement Ltd., I, the undersigned hereby guarantee to you the payment of and undertake on demand in writing made on the undersigned to pay to you all sums of money which may now be or which here

after may from time to time become due” etc.

The Plaintiff is the sole surety to that Guarantee. If in fact, similar Guarantee have been executed by Second and Third Defendants. This would give the Plaintiff a right of indemnity against both the Second and Third Defendants, as co-sureties of the same loan to Electronic Amusement Ltd.

In Halsbury’s Laws of England (fourth edition) Vol. 20 paragraph 20.

220. How right to contribution arises

“A surety who has paid more than his share of the common liability is entitled to compel contribution from his co-sureties whether they are bound jointly or severally, and by the same or different instruments, and whether the surety claiming contribution did or did not know, when he became bound as such, that he as co-surety with others.

The right to contribution is not founded on contract, but is the result of a general equity arising at the inception of the of the contract of guarantee on the ground of equality of burden and benefit.”

Equality of benefit, is important, in that if benefits were accorded the Second and Third Defendants by N.C.B, then such benefits should also be given to the Plaintiff that is where a co-surety is released the security given by the other will also be discharged (**Bolton v. Salman**) [1891] 2 Ch. 48 at page 53.

It was submitted on behalf of the Second and Third Defendants that the Plaintiff has pleaded no contractual links between himself and them.

Neither did he established in his pleadings a duty of care owed by the Defendants to the Plaintiff and pleaded that breach. But the failure of the Plaintiff to so plead is not fatal as demonstrating no reasonable cause of action. See paragraph 220 of Halsbury's Laws of England (*supra*).

In **Duncan, Fox & Co. vs. North and South Wales Bank** (1880-81) 6 A.C 1 at page 19. Lord Blackburn, in looking at the rights of the surety in a case concerning an endorser of a bill of exchange said:

*"I think it is established by the case of **Derring v. Lord Winchelsea** and the observations on that case by Lord Eldon in **Craythorne v. Swinburne** and Lord Redesdale in **Stirling v Forrester**, that where a creditor has a right to call upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each share bear no more than its due proportion. This is quite independent of any contract between the parties thus liable. Lord Eldon in **Craythorne v. Swinburne**, says of **Derring v Lord Winchelsea**. "That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction" and Lord Redesdale in **Stirling v Forrester** says, the principle established in the case of **Derring v Lord Winchelsea** is universal that the right and duty of contribution is formed upon doctrines of equity it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience (if not by contract) to give to the party paying the debt all his remedies against the other debtors".*

The Plaintiff's Statement of Claim despite its imprecision and omission, may be improved in order to bring the controversy between the parties to an end. There is clear authority for this course.

In **Overton C. Hutchinson vs Ellis, Victor Shepherd (Executor of the estate of Jula Burgher, deceased) (supra)** at page 195 letter B:

*“A Judge is entitled to strike out pleadings in plain and obvious cause where he is of the view that the pleadings are redeemable by amendment, then he ought not to strike out the pleadings. **Republic of Peru v Peruvian Guano Company** 36 Ch. D. 496.”*

The Court of Appeal had earlier examined the matter of **David Rudd vs Crowne Fire Extinguisher Services Ltd and Edward Taylor and Jamaica Public Service Co. Ltd.** (1989) 26 J.L.R 563 where Downer, J.A., in illustrating how the Court dealt with inadequately drafted pleadings quoted with approval from **The Republic of Peru** case, thus:

“If not withstanding defects in the pleadings, which would have been fatal on a demurrer, the court sees that a substantial case is presented the court should, I think, decline to strike out that pleading, but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation”.

Statute Barred

It was submitted that the claim against the Second and Third Defendants are statute barred. I think not. Time runs against a person seeking to enforce an indemnity from the date when he is called upon to pay.

The Statement of Claim allege that the demand by the First Defendant was in a letter dated 4th October, 1995. The Order granting leave to amend was on 18th June, 2001.

The Plaintiff will be allowed to amend his pleadings within fourteen (14) days of the Order herein, failing which, the claim in respect of the Second and Third Defendants will be struck out as having no reasonable cause of action. Costs of this application to the Second and Third Defendants.