



[2021] JMSC Civ. 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02555

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|----------------|---|---------------------------|
| BETWEEN | DENTON DUNKLEY | CLAIMANT/APPLICANT |
| | (a minor who sues by his mother and next friend, Nadine Hayles) | |
| AND | LENSFORD HALL | DEFENDANT |

IN CHAMBERS

Miss Shantel Jarrett instructed by Zavia Mayne and Company appearing for the Claimant/ Applicant

Mr. Miguel Palmer present for the Defendant

The parties were absent

Heard: February 4, 2021 and March 26, 2021

Application to substitute a Defendant – whether Rule 19.4 allows substitution after the limitation period has expired

LAWRENCE GRAINGER, J (AG)

[1] On the 4th February, 2021, I delivered an Oral Judgment where I refused an Application to substitute Mr Shanglee Stephen for Mr Lensford Hall as the Defendant herein. These are the written reasons for my decision.

BACKGROUND

- [2] The application arose out of a claim filed on the 11th March 2015 by Mr Denton Dunkley (a minor suing by his mother and next friend Nadine Hayles) against Mr Lensford Hall, to recover damages for personal injuries arising out of a motor vehicle accident.
- [3] The allegations were, that on the 18th September 2012, young Denton, then sixteen years old, was a passenger in a motor vehicle travelling from Waterloo District to Spanish Town in the parish of St Catherine. On reaching the vicinity of Waterloo Square, the motor vehicle in which he was travelling stopped along the roadway, when the vehicle which the Defendant was driving collided in the rear of the motor vehicle in which the claimant was travelling. The type of vehicle being driven by the Defendant was not stated. It was only identified by its registration plates.
- [4] The Claimant suffered a range of injuries to include lower back pain and whiplash injury.
- [5] In the Affidavit of Service, the process server stated that the Defendant was served on March 21, 2015. The Defendant however filed an Acknowledgment of Service on 22nd May 2015, indicating that he did not get the relevant court documents until 7th May 2015 and that he intended to defend the whole claim. However, from 10th April, 2015 Judgment in Default of Acknowledgment of Service was already entered against him. The Applicant however did not pursue enforcement.
- [6] On the 17th June 2015, the Defendant filed his Defence. He admitted that he owned the motor vehicle that it was alleged was involved in the motor vehicle accident, PE 0336, but denied that his motor vehicle was involved in any accident, neither on the date alleged nor at any time before or after the date alleged, nor at Waterloo Square or anywhere at all. The Defendant further added that he had not travelled to St Catherine nor its environs since 1991.

[7] The next document filed after the Defence was the Ex Parte Notice of Application for Court Orders filed on the 29th September 2020 and is the subject of this Judgement. The matter was not referred to a Case Management Conference and none was held.

THE APPLICATION

[8] The Claimant filed the Ex Parte Notice of Application for Court Orders seeking the following Orders:

- i. That Mr Shanglee Stephen be substituted as the Defendant in these proceedings;
- ii. That the Claimant be given permission to serve the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein on Mr Shanglee Stephen;
- iii. That Mr Shanglee Stephen be permitted to file his Acknowledgment of Service and Defence within 14 days and 42 days respectively after the service of the Amended Claim Form and the Particulars of Claim;
- iv. That the costs of the application be costs and the claim and
- v. Such further and or other relief that this Honourable Court deems fit.

[9] The Application was made pursuant to Rules 19.3 and 19.4 of the Civil Procedure Rules, 2002. The other grounds on which the Applicant sought the said orders were as follows, that: -

- i. the relevant limitation period was current when the proceedings were started,
- ii. the substitution was necessary in the circumstances,

- iii. the new party is to be substituted for a party who was named in the Claim Form in mistake for the new party, and
- iv. the claim cannot properly be carried on against the existing Defendant unless the new party is substituted as Defendant.

THE AFFIDAVIT IN SUPPORT OF THE APPLICATION

- [10] Ms Petrina Williams, attorney-at-law for and on behalf of the Claimant/Applicant swore to the lone affidavit in support of the application. She deponed that it was based on the information provided by the Claimant that it was determined that the other motor vehicle involved in the accident was registered as PE 0336 and having carried out some enquiries, the vehicle was registered to the Defendant, Mr Lensford Hall.
- [11] Counsel recounted that since October 2012, numerous letters had been sent to the Spanish Town Police Station and the Office of the Commissioner of Police requesting a Police Report to confirm the registration numbers of the vehicles involved in the collision, but it wasn't until the 30th April 2020 that the Report was sent to her office.
- [12] She averred further that on receipt of the Report, she realized that the registration number of the other vehicle was PE 0637 and not PE 0336. The Police Report also indicated that the name of the owner of the vehicle was Mr Shanglee Stephen of a Spanish Town, St Catherine address.
- [13] Ms. Williams was of the view that the substitution is necessary as the claim cannot properly proceed against the owner of the motor vehicle registered PE 0336 as that motor vehicle was not involved in the collision. She stated that it was the vehicle registered at PE 0637 that was involved in the accident and the driver/owner of that vehicle, Mr Shanglee Stephen, is liable to compensate the Claimant for the injuries and loss sustained.

- [14] She indicated that Mr Lensford Hall was named as the Defendant by mistake, by virtue of the incorrect registration number. She added that the limitation period was current at the time the Claim Form was filed and that Mr Shanglee Stephen will not be prejudiced if he were substituted as the Defendant, as he will not be deprived of the opportunity to put forward a defence. On the other hand, the Claimant would suffer great prejudice if the claim was not heard on its merits.
- [15] The Affidavit was accompanied by five (5) attachments, four (4) letters from Zavia Mayne and Company, attorneys-at-law (who appeared for the Claimant /Applicant) and one from the Office of the Commissioner of Police.
- [16] Two of the letters were addressed to the Spanish Town Police Station, the first dated October 12, 2012 and the second dated the 21st August 2014. The former requested the Police Report and the latter complained of the delays in receiving several Reports and asked again for the Report.
- [17] The next letter was not dated but was received at the Office of the Commissioner of Police on the 9th April 2019. In the letter, a request was made for their intervention in obtaining the Report and it also pointed out that the report was requested from October 2014 from the Spanish Town Police Station but the information received was that there was no record of the accident.
- [18] Another letter dated April 12, 2019 was sent to the Office of the Commissioner of Police, attaching among other documents the request that was made to the Spanish Town Police Station and their proof of payment for the Report.
- [19] On April 30, 2020, the Office of the Commissioner of Police sent the Report to Counsel.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT/APPLICANT

- [20] Ms. Shantel Jarrett made oral submissions on behalf of the Claimant/Applicant. She reiterated the content of the Affidavit and submitted that the mistake was no

fault of the Claimant and he should not be prejudiced as a result of the length of time it took for them to get the information from the Police.

[21] She said the issue was not with the individuals but with the licence plates, that they were not very dissimilar in terms of numbers and based on that there could be a substitution. Further, that it is not that they were trying to substitute Defendants, but the application was based on whom the registered owner of the licence plate is. She presented no authorities.

[22] Mr Miguel Palmer who represents the Defendant Mr Lensford Hall was present but did not address the court.

ISSUE

[23] The main issue was whether the Court should grant the application to substitute the Defendant in light of the fact that the application was made after the relevant limitation period had ended.

LAW AND ANALYSIS

[24] The Applicant relied on Rules 19.3 and 19.4 but I will at first set out all the relevant rules, which address the issue of the substitution of a party.

[25] Rule 19.2 (5) of the Civil Procedure Rules, 2002, provides that:

The court may order a new party to be substituted for an existing one if –

a) ...

b) The court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

[26] Rule 19.3 provides

(1) The Court may add, substitute or remove a party on or without an application;

- (2) An application for permission to add, substitute or remove a party may be made by
 - a) An existing party or;
 - b) ...
- (3) An application for an order under Rule 19 2(5) (substitution of new party where existing party's interest or liability has passed) may be made without notice but must be supported by evidence on affidavit;
- (4)
- (5) The Court may add, remove or substitute a party at or after the Case Management Conference.

[27] Special Provisions about adding or substituting parties after the end of a relevant limitation period are addressed in Rule 19.4. It reads:

- 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. ...

c. ...

- [28] Pursuant to Rule 19.3, the application was made by the Claimant/Applicant, an existing party to the claim, without Notice but with a supporting Affidavit and so the Court had jurisdiction to hear the application.
- [29] No Case Management Conference (CMC) was held but this application was made more than five years after the registry should have fixed a Case Management Conference date as mandated by Rule 27.3. Therefore, I do not believe that the jurisdiction of the court is ousted in the absence of the CMC, which was required as per Rule 19.3 (5).
- [30] Given that the Police Report states that the driver involved in the collision was Mr Shanglee Stephen, it is undisputed that the Court could resolve the issue of liability more effectively by the substitution of Mr Stephen as the Defendant.
- [31] However, the collision occurred in September 2012 and by the time the application was made in September 2020, eight years had elapsed.
- [32] The Jamaican Limitation of Actions Act, at section 46, provides that the United Kingdom Statute 21 James I. Cap. 16, (Statute of Limitation 1623) has been adopted and recognized as part of the laws of Jamaica.
- [33] Section 3 of the Statute of Limitation 1623 provides that: -

“And be it further enacted, That all actions of trespass quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrears of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass quare clausum fregit, within three years next after

the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.”

[34] Therefore, under the Statute of Limitation 1623, the limitation period in respect of actions founded upon the case, including actions for negligence, is six (6) years. Given our adoption of the Statute of Limitation of 1623 into our laws, the period for negligence actions in Jamaica is also six (6) years.

[35] As Rowe P said as far back as 1985 in ***Lance Melbourne v Christina Wan (1985)*** 22 JLR 131, 135:

- “The Jamaican courts have over the years treated actions for negligence as actions upon the case to which the six-year period of limitation applies. ...As the law now stands 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.”

[36] Therefore, were the application to be granted, Mr Shanglee Stephen would be joined in the suit as a Defendant more than two years beyond the six years allowed.

[37] The main question therefore concerns Rule 19.4. and the interpretation it is to be afforded. On the face of it, it does appear that the expiration of the limitation period was not a bar to such an application being successful as:

- a. The proceedings were filed only two and half years after the collision and so is within the six years allowed;
- b. The substitution appears to be necessary as the claimant had mistakenly sued the current Defendant and it is Mr Shanglee Stephen who they are now alleging was the driver of the motor vehicle involved in the accident.

- [38] However, the decision of Morrison P in the case of ***Tikal Ltd and Wayne Chen vs Everley Walker [2020] JMCA Civ 33*** is instructive.
- [39] The ***Tikal*** case concerned an application to add a Defendant to a claim after the expiration of a relevant limitation period. The Court considered both Rules 19.4 and 20.6 of the Civil Procedure Rules.
- [40] Briefly, the facts of ***Tikal*** are that a suit was filed on the 4th January 2012 whereby the Claimant, Mr Everley Walker, sought damages for negligence and breach of the Occupiers Liability Act against Super Plus Food Stores Limited. It was alleged by the Claimant that on the 21st February 2009 he fell in a supermarket and suffered injuries and loss as a result. The supermarket was owned, operated or occupied by the Defendant.
- [41] The Defendant filed its Defence almost 4 years after the Claim Form was filed. It denied that it was the owner or occupant of the premises. Consequently, the Court granted an order, on an amended application to add a defendant, filed in July 2017, for the Claim to be amended 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 Defendant.
- [42] Morrison P quoted with approval Sykes J (as he then was) in the case of ***Peter Salmon V Master Blend Feeds Limited***, (Unreported), Supreme Court, Jamaica, Suit No CL 1991/S 163, judgment delivered October 26, 2007 where he lamented the discrepancy between the clear implications of the Statute of Limitations and the power seemingly being granted by Rule 19.4:

. “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.”

[43] President Morrison repeated the often-cited statement that subsidiary legislation is subordinate to primary legislation and so the Rules cannot overrule legislation. He cited Lord Scott of Foscote in the case of ***Beverley Levy v Ken Sales & Marketing Ltd*** [2008] UKPC 6, paragraph 19, where he opined that while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction. President Morrison then concluded that Rule 19.4 cannot confer jurisdiction on the court to extend a limitation period in the absence of any amendments to the Statute of Limitation to that effect.

[44] I respectfully adopt the views expressed in ***Tikal*** as being applicable to the present case and that though the case at bar concerned an application for a Defendant to be substituted, not added, the same considerations apply.

[45] Similar principles were expounded in ***The Attorney General of Jamaica vs Cleveland Vassell*** 2015 JMCA CIV 47 where Dukharan JA delivered the Judgment of the Court and said this at paragraph 16 in relation to the Limitation of Actions Act:

“It is noted that for the purposes of the Act an amendment to add or substitute a new party, or a cause of action, is deemed to be a separate claim and to have commenced on the same date as the original claim. Therefore, if the original claim was commenced within the relevant limitation period (six years) and an amendment is allowed, adding a party or cause of action after the expiry of the limitation period, a defendant will be deprived of the limitation defence and will usually cause injustice not compensable by an order for costs. The usual rule therefore, is that such amendments are not permitted”.

[46] Likewise, in the case at bar, given that the claim would have become statute barred on the 18th September 2018, with there being no changes to the Statute of

Limitations extending the lifetime of negligence claims or making some exceptions to the six year period, the application, being made two years after September 2018, could not be granted. This is so although the relevant limitation period was current when the proceedings were started and the substitution may have been necessary.

- [47]** In the supporting Affidavit, the issue of prejudice was raised by the Claimant/Applicant. It was stated that Mr Shanglee Stephen would not be prejudiced if he were substituted as the Defendant as he would be allowed to defend the claim and that the prejudice to the Claimant is greater if he not be allowed to pursue the claim against Mr Stephen.
- [48]** The Court accepts that the risk to the Claimant is great. If this application is not granted, he will be deprived of having his day in court with what he no doubt considers to be a strong case.
- [49]** The Court therefore gave consideration to the reasons advanced by the Claimant in the Affidavit in Support, for the delay in bringing the application.
- [50]** However, the limitation period is there to bring certainty and finality to litigation. A Defendant should know that at some specific time, he will not be brought before the courts, and at a time when his witness may have died, cannot be located or he himself may have forgotten about the details of the incident.
- [51]** It was the Claimant himself, though a minor, who provided the incorrect information to the lawyers so he is not blameless. The Affidavit speaks to several letters being sent to the Spanish Town Police Station requesting the Police Accident Report but only two were attached, one from 2012 and the other in 2014. It was not until 2019, almost seven years after the accident that help was sought from the Office of the Commissioner of Police. When assistance was requested from that office, the limitation period had already expired. The Defendant filed his defence in 2015. Given the content of the Defence, the Court felt that the Office of the Commissioner of Police should have been contacted then.

[52] Mr Shanglee Stephen should not now be brought in as a Defendant two years after the action became statute barred. That would be the greater injustice.

[53] The Court in **Tikal** also examined Rule 20.6 which provides as follows:

- 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.

[54] In the case at bar, the Claimant / Applicant did not ground his application on Rule 20.6 but like in **Tikal**, this Court considered whether that rule was applicable. The Court examined Rule 20.6 as in the Affidavit in support of the application, the affiant deponed that she wished to correct the mistake in the name of the Defendant because a genuine mistake was made when Mr Lensford Hall was sued. It appears therefore that Rule 20.6 was not stated but the principles enunciated in the Rule were relied upon.

[55] Again, the Court in **Tikal** adopted the approach taken by Sykes J (as he then was). This time it was in the case of ***Elita Flickinger (Widow of the deceased Robert Flickinger) v David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club and Cottages Limited*** (Unreported), Supreme Court, Jamaica, Suit No CL F 013/1997, judgment delivered 31 January 2005. Sykes J said the following:

“the distinction between misnaming and misidentification is crucial and fundamental ...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”.

- [56] Morrison P approved of Sykes J's categorisation when he concluded that Rule 19.4 covered cases of misidentification while Rule 20.6 had to do with cases of misnaming.
- [57] The Concise Oxford Dictionary defines "Misname" as *to give a wrong or inappropriate name to*. In the case at bar, Mr Lensford Hall was not before the court as a result of him having a wrong or inappropriate name. He was before the court as the person who it was being alleged was driving the vehicle that collided in the rear of the one in which the Claimant was a passenger. He was the exact person that the Claimant wished to be the Defendant then. This was not a case of misnaming. Therefore, Rule 20.6 was not applicable.
- [58] It appears however that Mr Lensford Hall was incorrectly identified and so this became a case of misidentification. The Applicant therefore correctly made the application pursuant to Rule 19.4.
- [59] Rule 1.1 (1) of the Civil Procedure Rules has as its overriding objective to deal with cases justly. Rule 1.2 provides that the court must seek to give effect to the overriding objective when interpreting the rules or exercising any powers under them. Dealing justly with a case includes among other things saving expense and ensuring that the case be dealt with expeditiously and fairly. To allow the substitution would not advance any of the stated aims of saving expense or dealing expeditiously with a case. So much time had already passed. To allow the substitution of Mr. Stephen would not be just.

CONCLUSION

- [60] The Court therefore denied the application to substitute the Defendant in light of the fact that the application was made after the relevant limitation period had ended and the Court is of the view that the greater prejudice would be occasioned by Mr Stephen if the Order were granted and in all the circumstances, to refuse the Application was the most just outcome.

ORDER

1. Ex Parte Notice of Application for Court Orders filed on the 28th September 2020 is refused
2. No order made as to costs
3. The Claimant's/Applicant's attorney-at-law to prepare file and serve the Order herein.