[2022] JMSC Civ 107

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV02631

BETWEEN	**JASON M^{C}FARLANE (Administrator Ad Litem in the Estate Of Carol McFarlane, Deceased, Intestate)**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Ms. Kara G. Graham Attorney-at-Law for the Claimant/Respondent

Mr. Joerio Scott, Attorney-at-Law, instructed by Samuda & Johnson Attorneys-at Law for the Defendant

June 27 and July 4, 2022

Pleadings – Amendment to Pleadings – Substitution of Parties – Whether Claimant changed her status as one party to another party – Whether Claimant's Change in status is the same as substitution of a party – Whether Claimant permitted to substitute a claimant under the general provisions relating to amendment of statement of case before a Case Management Conference.

Pleadings – Amendment to Pleadings – Relation Back Principle of Amendments to Pleadings – Whether amendment to sue as Administratrix renders entire claim a nullity.

DALE STAPLE, J (AG)

BACKGROUND

[1] On or about the 29th June 2016, the deceased husband of the now deceased Carol McFarlane allegedly met his demise when he allegedly became entangled in some wires the Claimant claims belonged to the Defendant whilst he was riding his motor cycle along the Agualta Vale Main Road in the parish of St. Mary.

[2] The case for the Claimant is that the wires they claim to be the property of the Defendant, had fallen in the road from a utility pole, the property of the Defendant as a result of the negligence of the Defendant and the Defendant negligently left the fallen wires in the road. As a result, the Claimant contends that the Defendant caused the death of the deceased Melbourne McFarlane when he became entangled in the wires.

[3] To this end, Mrs. Carol McFarlane commenced this present Claim on the 28th June 2019 as a **near relation** (emphasis mine) of the deceased Melbourne McFarlane pursuant to the **Fatal Accidents Act** for the benefit of the near relations of the deceased.

[4] The Defendant filed a defence to this claim and the matter was proceeding to mediation. The Court is uncertain as to whether mediation has in fact taken place as there is no Report from the Mediator on the physical file.

[5] Sometime later, the Claimant filed an Amended Claim Form and Particulars of Claim on the 23rd February 2021 wherein she changed her status from **Near Relation** to **Administratrix** of the Estate of the deceased Melbourne McFarlane she having obtained letters of Administration. She also added a cause of action under the **Law Reform (Miscellaneous Provisions) Act** for the benefit of the estate of the deceased.

[6] The Defendant thereafter filed this application to strike out the Claimant's claim as being a nullity and void *ab initio* (from inception).

[7] The Court is therefore tasked with resolving the question of whether the entirety of the Claimant's claim is now rendered a nullity by virtue of the amendment or whether it can be preserved at all and to what extent.

[8] The Court is grateful for the oral and written arguments presented by both Counsel as well as the submissions provided. All have been considered.

FACTS

[9] The material facts giving rise to the application are not in dispute and were essentially summarised in the background.

[10] Insofar as is relevant to the considerations of this Application, the material facts are that the original claim was filed by Mrs. Carol McFarlane as a **near relation** under the **Fatal Accidents Act**.

[11] She subsequently obtained Letters of Administration for the estate of the deceased Melbourne McFarlane on the 3rd September 2020. She then filed the amended Claim Form and Particulars of Claim on the 23rd February 2021.

[12] The amendments to the Claim Form are to be found in the second paragraph where she now asserted (as underlined), "…succumbed to his injuries and by virtue of his death, his expectation of a healthy and normal life was shortened, and his estate has thereby [sic] loss and damage. The Claimant, spouse and the dependent of the deceased has loss [sic] her benefit as a result of the death of the deceased." The prayer for relief was also amended where she has added a claim for damages for Negligence and Damages under the Fatal Accidents Act and Law Reform (Miscellaneous Provisions) Act.

[13] The Amendments to the Particulars of Claim are as follows:

a. *Paragraph 1 was amended to change her status and the nature of the claim from the spouse and dependent making a claim under the Fatal*

Accidents Act to the ***spouse and Administratrix of the Estate of Melbourne McFarlane*** *(emphasis mine) and bringing the action for and on behalf of the estate and for loss of dependency.*

b. *The first paragraph 1 on page 2 of the Amended Particulars of Claim states in underline, "That loss and damage has been caused to his estate. The Claimant being his dependant thereby suffered loss."*

c. *Paragraph 2 on page 2 of the Amended Particulars of Claim stated that the deceased's motor cycle was completely damaged as a result of the accident.*

d. *The Claimant has added Particulars Pursuant to the Fatal Accidents Act of Jamaica and Law Reform (Miscellaneous Provisions) Act.*

e. *The Claimant added a claim for the expenses of obtaining a grant of administration as well as claims for special damages.*

f. *The prayer was amended to ask for Damages for Negligence as well as Damages under the Fatal Accidents Act of Jamaica and the Law Reform (Miscellaneous Provisions) Act.*

[14] The Defendant then filed the present application to strike out the entirety of the Claimant's claim.

[15] During the intervening period, the Claimant, Carol McFarlane, died and by Order of Opal Smith J (Ag), the present named Claimant, Jason McFarlane, was named Administrator *Ad Litem* in the estate of his mother, Mrs. Carol McFarlane to continue this present suit.

SUBMISSIONS OF THE PARTIES

[16] The Defendant's submissions as the Court understands them, are that the Claim has become a nullity by virtue of the fact that the deceased Claimant, by changing her status to that of an Administratrix and the relation back effect of amendments to statements of case, would be deemed to have started this claim at a time when she did not have the status of an administratrix and, as such, did not have the

authority to institute the claim as administratrix. Hence, the Claim would have to be deemed a nullity and void from inception.

[17] The Claimant's submissions are that the claim is not a nullity and the amendment is simply the Claimant amending the Claim to reflect her new status as the Administratrix of the Estate of the deceased and properly exercising her power to add a new cause of action to the proceedings as she would be allowed to do.

ISSUES

[18] The Court has determined that the following are the issues to be resolved in this claim:

(i) What is the scope of the power to amend a statement of case before a case management conference?
(ii) Did the Claimant change her status by virtue of the Amendment and could she have done so without the permission of the Court?
(iii) If the amendment was invalid, can the Court disallow the amendment and leave the Claim as it was before the Amendment intact pursuant to Rules 20.2(1) and 26.9 or are the proceedings an incurable nullity?

ANALYSIS

The Scope of the Power to Amend a Statement of Case Before a Case Management Conference

[19] It is my view that Claimants are not at large to amend their Statements of Case before a Case Management Conference.

[20] Part 20 of the Civil Procedure Rules governs amendments to statements of case. Rule 20.1 states as follows:

> ***A party*** *may amend a statement of case at any time before the case management*
> *conference* ***without the court's permission*** *(emphasis mine) unless the amendment is one to which either:*

(a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or

(b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period),

Applies.

[21] So rule 20.1 seems to give a broad power of amendment to statements of case outside of the two stated exceptions set out in 20.1. This provision applies to **a party** (emphasis mine). This makes it clear that this provision speaks to all parties to a claim. A party, under Rule 2.4, includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only. This provision therefore applies to both Claimant and Defendant or a person joined as an interested party.

[22] However, when one examines the language of Part 19, concerning the addition and/or substitution of parties, a different picture seems to emerge.

[23] Rule 19.2(1) gives **a Claimant** (emphasis mine) the power to add a new **defendant(s)** to the claim at any time before case management conference without permission of the Court (emphases mine). There is therefore a distinction between the provisions under rule 20.1 and rule 19.2(1) where parties are concerned. It appears to me that a Claimant is more constrained in terms of the amendments to statements of case where the addition or substitution of parties is concerned.

[24] Rules 19.2(3) -(5) seem to confine any additional powers of change of parties to the court. By not naming “the Claimant” or “a party” as being capable of doing

these changes on their own by amendment without permission (as it did in rule 19.2(1)), the rules seem to exclude the power of "the Claimant" or "the party" so to do even before a case management conference. I will set out the relevant provisions as follows:

> ***(3) The court*** *may add a new party to proceedings without an application, if –*
>
> *(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or*
>
> *(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.*
>
> *(4)* ***The court*** *may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.*
>
> *(5)* ***The court*** *may order a new party to be substituted for an existing one if -*
>
> *(a) the existing party's interest or liability has passed to the new party; or*
>
> (b) *the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.*

[25] The rules go further by setting out the procedure for adding or substituting parties in rule 19.3. Rule 19.3 says as follows:

> *(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) a person who wishes to become a party.*
>
> *(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) No person may be added or substituted as a claimant unless that person's written consent is filed with the registry.

(5) ***The court*** *may add, remove or substitute a party at or after the case management conference.*

(6) An order for the addition, substitution or removal of a party must be served on –

(a) all parties to the proceedings;

(b) any party added or substituted; and

(c) any other person affected by the order.

(7) Where the court makes an order for the removal, addition or substitution of a party, it must consider whether to give consequential directions about –

(a) filing and serving the claim form and any statements of case on any new defendant;

(b) serving relevant documents on the new party; and

(c) the management of the proceedings,

and subject to such directions rule 19.2(2) applies.

(8) Where –

(a) the court makes an order for the addition or substitution of a new defendant; and

(b) the claim form is served on the new defendant,

these Rules apply to the new defendant as they apply to any other defendant.

[26] So reading rules 20.1, 19.2(1), 19.2 (3) -(5) and 19.3 together would suggest that a Claimant can amend their statement of case at any time without permission or order of the court before case management conference for any matter outside of:

g. Addition or substitution of Claimants;
h. Substitution of Defendants;
i. Removal of Parties;
j. Addition or substitution of classes of parties outside of a "Defendant" or "Claimant" such as an "interested party";
k. The circumstances as set out under rule 19.4; and
l. The circumstances as set out under rule 20.6

[27] I form this view on the basis that the general power found under rule 20.1 to amend a statement of case cannot derogate from the specific powers as outlined in part 19 concerning the addition or substitution of parties. When it concerns amendments to add or substitute parties, then it is the specific provisions under Part 19 that should prevail (especially concerning the Claimant).

[28] Though rule 20.1 does specify two limiting factors to a **party's** (emphasis mine) power to amend without permission before case management conference, I am of the view that this power under rule 20.1 is further circumscribed, as far as a Claimant is concerned, by the wording of rules 19.2(3) -(5) insofar as those rules do not state that a Claimant can perform those tasks without an order of the court. Were it otherwise, the drafters would have specified in rules 19.2 (3) -(5) that the court **or a Claimant** (emphasis mine) may carry out those actions on or without an application and without the permission of the court before a case management conference (as it did in rule 19.2(1)) and a similar provision would have been inserted in rule 19.3(1).

[29] It is important to point out that Rule 20.1 says that the Court's **permission** (emphasis mine) is required in matters under rules 19.4 or 20.6. But that does not take away from the fact that Rules 19.2(3) -(5) require **orders** from the Court. So if a party wishes to proceed with an application under rule 19.4 or 20.6, they would

need the court's **permission**. Otherwise, outside of adding Defendant(s) or making changes to the claim (outside of what was outlined in paragraph 26 above), a Claimant only needs a court order but not its permission.

Did the Claimant change her status by virtue of the Amendment and could she have done so without the permission of the Court?

[30] The Court finds that the Claimant has changed her status by virtue of the amendment and that she could not have so done without the Order of the Court.

[31] The Claimant commenced the claim initially as a near relation pursuant to s. 4(1)(b) of the **Fatal Accidents Act**. Section 4(1) gives power to 2 classes of persons to make claims under the **Fatal Accidents Act**; the personal representative of the deceased, or the near relation of the deceased.

[32] Whilst it is true that a near relation may also be a personal representative (as in they are one and the same individual), the statute makes it clear that they are treated as two separate claimants for the purposes of a claim under the **Fatal Accidents Act**. A near relation, in my view, can only claim in circumstances where:

m. The office of personal representative is vacant; or
n. The personal representative has instituted no action within 6 months of the death of the deceased.

[33] So if there is a personal representative, a near relation can bring no claim. The two classes cannot subsist at the same time in the claim. Nor can a personal representative bring one claim, and a near relation bring another claim[1]. It is one Claim and it is to be brought by either the personal representative or the near

[1] See section 4(3) **Fatal Accidents Act**

relation in the appropriate circumstances. Indeed, s. 4(3) states that there can only be one claim under the **Fatal Accidents Act** for the benefit of the near relations.

Has The Claimant's Status Changed?

[34] The question now is whether or not the Claimant has changed her status from near relation to personal representative? The answer to my mind is yes she has so done. This is because, as I found, both the office of personal representative and the class of near relation cannot subsist at the same time in the same claim. There can be no merger of classes into one.

[35] So once it is that the Claimant acquired Letters of Administration on September 3, 2020 and then amended the Claim to reflect this new status, she changed her status.

[36] For the matter of the pleadings, what is the effect of such a change in status? To my mind, it is substituting one party for another under Part 19. In this regard, I respectfully disagree with the submissions of the Claimant/Respondent under the heading Issue #2. It is important to recall that under the **Fatal Accidents Act**, there are only two classes of parties recognised; the personal representative and the near relation. So to start the claim as a near relation, it is presumed that either the office of the personal representative is vacant or the personal representative has taken no action in 6 months after the death of the deceased.

[37] In the heading in the Particulars of Claim filed on the 28th June 2019, the Claimant identifies her status as "near relation of the deceased Melbourne McFarlane). Mark you, the Claimant did not aver any facts to establish her locus to bring the Claim at all i.e. she did not account for the office of personal representative. In my view, this ought to have been done as her ability to claim is dependent on the absence of the personal representative or their inaction for 6 months after the deceased's death.

[38] Even so, the fact is that the Claimant as personal representative has been in effect substituted for the Claimant as near relation.

[39] The Claimant has gone even further in confirming this change in status by expanding her claim to include a claim under the **Law Reform (Miscellaneous Provisions) Act.** This confirms in my view that she is now an entirely different claimant with different rights from what she was formerly.

Can She Change Her Status Without Court Order?

[40] It is my considered view that the Claimant cannot substitute one status for the other without Court Order. I base this on my analysis of the provisions dealing with the substitution of parties as set out above.

[41] As stated earlier, whilst it is permissible for a Claimant to add Defendants to a claim without the permission of the Court before the Case Management Conference, the Claimant cannot substitute one Claimant for another without court order even before the Case Management Conference.

[42] I find that only the Court may substitute a party and this is to be done by an Application. Further, the consent of the party to be substituted would have had to be filed in the Registry in accordance with rule 19.3(4). So the Claimant, as Personal Representative, would have had to file a Notice of Consent to be substituted. No such consent was filed.

[43] In the circumstances, I find that the Claimant's amendment to substitute herself as Personal Representative for herself as Near Relation is of no effect.

Can the Court disallow the amendment and leave the Claim as it was before the Amendment intact pursuant to Rules 20.2(1) and 26.9 or are the proceedings an incurable nullity?

[44] Mr. Scott strongly argued that based on the doctrine of relation back of amendments to statements of case, the Amended Claim Form and Particulars of Claim has to be treated as though this was the state of affairs when the Claim was filed in 2019.

[45] Accordingly, the Claimant would, at that time, have had no status to bring the Claim as Administratrix as she did not have, at the time of first filing, Letters of Administration. Accordingly, the Claim must be struck out as being a nullity as an Administrator cannot bring a claim unless they have been granted Letters of Administration in the estate of the person for whose estate they bring the Claim at the time of filing suit.

[46] Mr. Scott rightly argued that the *effect* of the amendment, if allowed to stand, would be that it would date back to the original issue of the claim and the action would continue as though the amendment had been inserted from the beginning[2]. As Smellie CJ stated in the case of ***Grupo Torras***[3],

> *"These rules as to the effect of an amendment are the reasons why a Plaintiff may not amend his writ by adding a new cause of action which has only accrued to him since the writ was first issued."*

[47] In support of his argument he cited the case of ***Haastrup v Okorie***[4] as well as the more known case of ***Ingall v Moran***[5]. In this case, the plaintiff issued a writ in an

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[2] See *Grupo Torras v Butterfield Bank* [2001] CILR p 9 at p 19 per Smellie CJ and *Sneade v Wotherton Barytes & Lead Mining Co. Ltd* [1904] 1 KB 295 at 297 per Collins MR.
[3] Id at para 32.
[4] [2016] EWHC 12 (Ch)
[5] [1944] KB 160

action brought by him under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out letters of administration until nearly two months after the date of the writ. On appeal to the Court of Appeal it was held, that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death could not be invoked so as to render the action competent.

[48] According to Scott LJ in the ***Ingall v Moran*** case[6], "An administrator is, of course, in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action, the plaintiff must have a cause of action vested in him at the date of the issue of the writ."

[49] Ms. Graham has argued in her submissions that the amendment would have taken effect from the date of the filing of the Amended Claim Form and Particulars of Claim as it was from that date that the estate claim commenced. The problem with that argument is that it would ignore the relation back principle of the effect of amendments to statements of case as set out above.

[50] The difficulty that Mr. Scott faces, however, is that in this case, unlike in the ***Ingall v Moran*** case, at the time of commencement of the suit, the Claimant was not suing in a representative capacity. She was not suing as administrator. She was

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[6] Id at p 168

suing as a near relation in her personal capacity. So the Claim as filed was indeed a valid one.

[51] The Claimant did not file the amended claim until after she received the Letters of Administration and thereafter changed her status to Administrator. Therefore, it cannot be argued that the Claim as initially filed was a nullity from birth.

[52] In my view therefore, the case is not void from the inception. It is simply that there has been an amendment that is not permissible.

Can the Claim be Cured by Removing the Offending Amendment?

[53] For my part, I hold that the Court can excise the offending amendment pursuant to my powers under rule 20.2 of the CPR and leave the claim as originally filed intact without doing the parties any injustice.

[54] The Court raised this argument with Mr. Scott and he agreed, in theory, but held to his nullity point to say that as the Claim is now a nullity, there was nothing to cure. However, as I have decided that the Claim was not a nullity from inception, I am of the view that rule 20.2 can now be applied.

[55] Rule 20.2 provides that the Court may disallow any amendment made by a party in circumstances where the Court's permission was not required. The Court may exercise this power with or without an application. I am minded therefore to exercise my power to remove the amendments. I do not think that it would do injustice to the parties as it would put them back in the position in which they were before the amendments were made. The Defendant had already filed a defence and the parties had been to mediation already. So it would just be for the case management conference orders to be made.

[56] The position of the Claimant is, indeed, an unfortunate one. She embarked upon an ill-advised course and it is now too late to bring a claim under the **Law Reform**

(Miscellaneous Provisions) Act. She will now have to be content with the claim under the **Fatal Accidents Act** as a near relation.

DISPOSITION

[57] The Application filed by the Defendant dated the 14th April 2021 is refused.

[58] The amendments to the Claim Form and Particulars of Claim by virtue of the Amended Claim Form and Amended Particulars of Claim filed on the 23rd February 2021 are disallowed and the claim shall proceed as originally commenced by the Claim Form and Particulars of Claim filed on the 28th June 2019 (subject to substitution of claimant as ordered by Opal Smith J (Ag)).

[59] The Defendant is to be awarded 50% of its costs on this application.

[60] The Case Management Conference is set for hearing on a date to be fixed by the Registrar.

[61] Leave to appeal granted.

[62] Claimant's Attorneys-at-Law to prepare, file and serve this order by 3:00 pm on or before the 15th July 2022.

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Dale Staple
Puisne Judge (Ag)