The Court of Appeal for Bermuda

CIVIL APPEAL No 5 of 2015

Between:

THOMAS GLEESON

Appellant

-v-

MARSHALL DIEL & MYERS

LUCIANO AIRCARDI

PARAGON TRUST COMPANY LIMITED

Respondents

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Tim Frith, Mello Jones & Martin, for the Appellant
Mr. Narinder Hargun, Conyers Dill & Pearman, for the Respondent

Date of Hearing: **10 November 2015**

Date of Judgment: **20 November 2015**

JUDGMENT

PRESIDENT

1. As every law student knows, a limited company and a partnership are different legal animals. On 25th April 2013 the appellant issued a writ against Marshall Diel and Myers Limited ("the company") and Luciano

Aircardi claiming an account of profits and damages for fraud and breach of fiduciary duty in 2007. But the company did not exist in 2007, it was only incorporated on 18 December 2009 and indeed it did not begin to practise law in Bermuda until 1 January 2012.

2. The plaintiff had intended to sue Marshall Diel and Myers (a firm) ("the firm"), the firm of lawyers in which Mr. Aircardi was a partner at the material time. The Chief Justice found that the intention was to sue the law entity which acted for the plaintiff in 2007 and that there was a genuine mistake as of the legal status and name of that entity. That finding is not challenged on this appeal. The Chief Justice however refused the plaintiffs leave to amend the writ to substitute the firm for the company. It is against that decision that the plaintiff has appealed.

3. The relevant provision in the Rules of the Supreme Court 1985 is to be found in Order 20, Rule 5, the relevant paragraphs of which provide:

> "(2) Where an application to the Court for leave to make the amendment mentioned in paragraphs (3),(4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued."

4. The writ was issued shortly before the end of the limitation period and was not served until almost a year later in April 2014. There had been some correspondence between lawyers for the appellant and Mr. Aircardi in 2008 but nothing thereafter. The Court has been given no explanation for the appellant's dilatoriness.

5. The first question is whether the mistake was as to the name or identity of the party intended to be sued. The Chief Justice said it was a mistake as to identity *and* name. He said at paragraph 12:

   > "The mistake does not clearly qualify for potential relief under Order 20 Rule 5 (3) because not knowing if a body corporate which did not exist in 2007 or a partnership which did was involved in a transaction raises issue of identity and nomenclature. As a result, accepting the plaintiff's submission that no mistake about the identity of the legal entity involved in the 2007 transaction occurred has a degree of artificiality about it."

6. Mr. Frith for the appellant relied upon *Evans Constructions Company Limited v Charrington & Co. Ltd* and anr [1998] QB 810 and *Adelson v Associated Newspapers* [2007] EWCA (Civ) and 701, [2008] 1 WLR 585. *Evans* was a case concerning an application for a new tenancy. Evans' solicitor made a careless but understandable mistake when he named the current landlord as Charrington & Co. Ltd. and not Bass Holdings Ltd. Charrington & Co. Ltd. had been the original landlord, but at some point assigned the reversion so that at the material time Bass Holdings was the landlord albeit Charringtons continued to act as managing agent for the new landlord. Both companies were in the Bass Charringtons Group. Donaldson L.J. in giving one of the two majority judgments of the Court allowing the amendment said at 821 G:

> "In applying Ord. 20, r. 5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances."

He went on at 822 B:

> "However, the matter does not stop there, because it is not every mistake of this character which can be corrected under the rules. The applicant for leave to amend has to satisfy the court that the mistake was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued."

And then at 822 E:

> "There remains a discretion whether to permit the amendment, for the court must be satisfied that it is just to do so: see Ord. 15, r. 5 (2). Suffice it to say that if the amendment were allowed Charringtons could have no complaint or regret. So far as Bass is concerned, it would regret that it had been deprived of a wholly adventitious chance of obtaining possession of the land without regard to the merits of its claim, but I do not regard this as a legitimate complaint in the circumstances of this case."

7. Griffiths L.J., who gave the other majority judgment, said at 825 E that he could not see why Ord 20 Rule 5(3) should not include a case where entirely the wrong name has been used, provided it was not misleading, or such as to cause any reasonable doubt as to the identity of the person to be sued. He went on that the wording of the rule makes it clear that it is not the identity of the person sued that is vital but the identity of the person intended to be sued, which is a very different matter.

8. In the *Sardinia Suleis* [1991] 1 Lloyds Rep. 201, Lloyd L.J. said this about the test to be applied to ascertain "the person intended to be sued":

> "In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v Harris Engineering* [1967] 2 QB 703 the identity of the person intended to be sued was the plaintiff's employers. In *Evans v Charrington* [1983] QB 810 it was the current landlord. In *Thistle Hotels v McAlpine* (unreported) 6 April 1989 the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* [1988] 2 Lloyd's Rep 274 it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise."

9. The third case to which it is necessary to refer is *Adelson*. Lord Phillips C.J., giving the judgment of the Court said at para. 43:

> "These authorities have led us to the following conclusions about the principles applicable to Ord 20, r 5. (i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a "mistake as to name" is given a generous interpretation. (ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorized the person issuing the process to start proceedings on his behalf. (iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used. (iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named."

10. Mr. Frith reminded us of the words of Bowen L.J. in *Cropper v Smith* (1884) Ch vol. XXVI 700 at p. 710 that it is a well established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. He went on to say that he knew of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. With this I entirely agree but I think the important consideration in the present case is whether the amendment would cause injustice to the other party.

11. I think the starting point in the present case is that the appellant did intend to sue the entity which, along with Mr. Aircardi had professional dealings with him during his proposed purchase of Sounion West in 2007. That brings the case within the category under the authorities where an amendment is prima facie permissible. I reach this conclusion in the light of the unchallenged finding of the Chief Justice at para. 12. The issue therefore becomes whether the partners in the firm were misled by the mistake and whether the Court should exercise its discretion under Ord20 Rule 5(2) to allow the amendment and substitute the firm for the Company.

12. Mr. Frith's argument is that the real question is whether there was a breach of duty and dishonest conduct by the firm not whether the appellant should be procedurally barred from pursuing his claim. See *G.L. Baker Limited v Medway Building Supplies Ltd.* {1958] 1 WLR 1216.

13. It is necessary at this juncture to say something about the background facts. In 2007 a residential property in Tuckers Town called Sounion West was owned by Mrs. Jones. There was a substantial mortgage on the property and the mortgagee was Mr. Flottl. Mrs. Jones wished to sell the property and instructed the firm in relation to the sale. The appellant was interested in purchasing the property which was being marketed by Karin Sinclair of Sinclair Realty. The appellant made a number of decreasing offers. The first was $7 million, then $6 million and eventually $5.7 million. His attorney, Hil de Frias of Mello Jones and Martin had reservations about whether good title could be assured and the appellant was using this as a negotiating tool. The issue, apparently, was whether Mr. Flottl had an interest in land; if his interest was no more than the mortgage there was no problem. The risk was of escheatment. The firm had taken the view that there were now real title issues and the point

came when the appellant was keen to instruct the firm to act for him presumably on the grounds that they would warrant good title, but he was only prepared to engage them if their professional liability insurance was adequate to meet any loss he suffered through failure to obtain good title. The firm's initial position, expressed by Mr. Aircardi, was that they could not act for the appellant as they were already acting for the vendor. Later Mr. Aircardi said they might reconsider the position if the vendor was represented elsewhere.

14. There was a critical exchange of emails. On 26 April 2007 the appellant emailed Mr. Aircardi asserting agreement had been reached and that M. Aircardi was willing to act for both the vendor and the appellant. The following day, 27 April 2007, Mr. Aircardi emailed the appellant saying that contrary to the appellant's assertion the vendor had not agreed to be represented by another firm. On 30 April 2007 there was a brief meeting at which Mr. Aircardi said Mrs. Jones was not prepared to sell on the appellant's terms. There is thus an underlying issue in the proceedings whether or not the firm was retained by the appellant.

15. On 9 September 2008 the appellant's lawyers Wakefield Quin, wrote to Mr. Aircardi at the firm formally asking for a full explanation of the situation that developed with regard to the proposed purchase of Sounion West. There was a detailed response on 18 October 2008 but nothing from the appellant or his lawyers thereafter until the issue of the writ in April 2013. The first indication of how the claim is put is in the Statement of Claim filed on 8 April 2014. The statement of claim refers inter alia to Mr. Aircardi as a director of the company and of the company being a party to a conspiracy.

16. The writ was filed in the Supreme Court Registry on 25 April 2013, close to the end of the six year limitation period, but it was not served until 17

April 2014. On 4 June 2014 the company issued a summons of strike out the claim against it on the basis that it was frivolous, vexatious or an abuse of process of the Court. The company did not exist in 2007, only being incorporated on 18 December 2009. Indeed prior to amendments to the Bermuda Bar Act 1974, effective from 19 October 2009, it was unlawful for a company to be engaged in the practice of law. In short, the company not only did not exist in April 2007; it could not have existed. The appellant's response to the summons was to apply for leave to amend by substituting the firm for the company under Ord. 20 Rule 5 i.e. the application giving rise to the present appeal.

17. The Chief Justice was satisfied that the mistake was a genuine mistake but was it misleading or such as to cause any reasonable doubt as to the identity of the person to be sued? That seems to me to be the critical question under Order 20 Rule 5(3). Mr. Hargun for the respondent makes the forceful point that this is far from the conventional case in which the plaintiff has identified the right defendant but has used the wrong name. The whole claim against the company and Mr. Aircardi is constructed on the basis that the first respondent is a company as opposed to a partnership. The following points seem to me to support the impression that a conscious decision had been taken not to sue the firm or its partners but to sue the company:

(i) The appellant's submission is that it was intended to issue proceedings against the legal practice which employed Mr. Aircardi and was the practice with which it was alleged the appellant entered into a retainer agreement. Liability was sought to be established against two persons, Mr. Aircardi and the company. But employment of Mr. Aircardi is consistent only with his employer being a company. As a partner in the partnership he cannot be employed by his

own firm, on the basis that no man can employ himself, see *Lindley v Banks on Partnership* 19th En. para. 3-06.

(ii) The statement of claim alleges conspiracy, claiming that Mr. Aircardi conspired with the company and another. A company, being a separate legal person, may conspire with its directors and the knowledge of a company may be found in the person who has its management and conduct. See *Belmont Finance Corporation v Williams Furniture Limited* (No. 2) [1980] 1 All ER 393. A partnership, having no legal personality, is incapable of being a party of a conspiracy.

(iii) The claim against the company in the statement of claim is on the basis that the company is a contracting party to the alleged retainer and/or on the basis of vicarious liability. The claim against the firm would be a claim against all the partners of the firm at the relevant time (the partners liability arising from Section 9 of the Partnership Act 1902).

(iv) The firm was not mentioned at all and it would not have been obvious from the entry in the cause book or when the writ was served, that the plaintiff intended to sue the firm. There is no reason to suppose the former partners of the firm, who were not directors of the Company, became aware of the writ until after expiration of the limitation period.

18. The Chief Justice made the point that it ought to have been obvious to the appellant's legal advisers that the company did not exist in 2007 prior to the amendments to the Bermuda Bar Act 1974 in 2009 which permitted lawyers to practice through a limited liability company. Mr. Frith submits that this point cuts both ways and it should have been obvious to the

respondent's lawyer too. How could they have been misled? The key player was Mr. Aircardi and they must have realised that reference to the company was a simple error; it was the firm who were the additional targets. In my judgment this is not an answer in the light of the four points above.

19. Mr. Hargun raised a further point both below and before us. The statement of claim appeared to allege that the company was liable for the acts of the former firm. Successor liability is a concept unknown to the law of England or Bermuda but it is not uncommon in the United States. There is no evidence that the respondent interpreted the claim in this way but it was entitled to assume these must have been a reason for suing the company which did not exist at the material time.

20. I am unable to accept Mr. Frith's argument that the simple error of naming the Company and not the firm as a defendant is not misleading and could not in the circumstances reasonably have misled anybody. I think the Chief Justice was correct on this issue.

Limitation

21. Before coming to the question of discretion it is necessary to say a word about limitation. Mr. Frith reminded the Court that a limitation defence is procedural and he challenges the statement of Georgia Marshall at para. 9 of her affidavit of 7 July 2014 that the partners at the former firm have accrued rights under the Limitation Act that will be destroyed if the amendment is allowed. He referred us to *Pontin v Wood* [1962] 1 QB 594, 609 and *Rodriguez v R.J. Parker* [1967] 1 QB 116. Whilst I accept Mr. Frith's submission, the fact that a limitation period has expired is nevertheless an important consideration in exercising the Court's undoubted discretion under Order 20 Rule 5. As. Mr. Hargun put it, limitation expiry is not a no entry sign.

Discretion

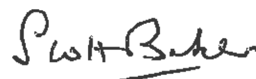
22. Even if the appellant is able to satisfy the requirements of Order 20 Rule 5(3) which in my judgment he is not, the court has still to exercise the discretion mentioned in rules 5(2) and (3). The discretion may be exercised to grant the amendment notwithstanding the six year limitation period has expired if the Court thinks it just to do so. The Chief Justice concluded it would not be just to do so and I cannot see that in so concluding he acted on any wrong principle, took anything into account that he should not have taken into account or failed to take into account anything into account that he should have taken into account. Accordingly, in the light of *G v G* [1985] 1 WLR 647 there is no basis upon which this Court can interfere. In my judgment the killer point against the appellant is that the firm had different partners to the individuals who were shareholders in the company when the proceedings commenced. None of the shareholders in the company were partners at the firm and not all partners in the firm were shareholders in the company. The firm ceased to operate in January 2012 and a new practice commenced as the company. Mr. Aircardi a partner in the firm, became a director of the company upon its incorporation on 18 December 2009 and remained so until his retirement from the firm in October 2011. The former partners in the firm settled their affairs with each other, and were entitled to do so, on the basis that the appellant was not pursuing a claim against the firm.

23. The changes in personnel between the firm (partners) and the company (directors/shareholders) is in my judgment critical, in particular as to those who were partners in the firm but had no role in the company. The limitation person had expired against them before leave to amend and substitute the firm was sought in June 2014. As Keene L.J. pointed out in the *SmithKline* case [2002] 1 WLR 1662 (see the judgment of Lord Philips

C.J. in *Adelson* at 604 para. 67) in such a case the Court will be likely to exercise its discretion against giving permission to make the amendment.

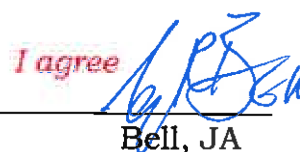
24. The appellant's difficulties on discretion do not quite end there because of the unexplained delay. Those who operate at the extremities of time limits run the risk that if a situation arises where they require the exercise of the Court's discretion their dilatoriness may count against them, particularly if, as in the present case, the appellant has chosen not to give any explanation for the delay.

25. In my judgment the Chief Justice was right not to allow the amendment and I would dismiss the appeal.



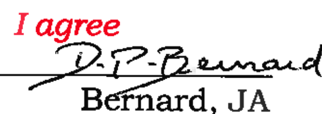
Baker, P

I agree



Bell, JA

I agree



Bernard, JA