In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 133

BETWEEN

THOMAS GLEESON

Plaintiff

-v-

(1) MARSHALL DIEL AND MYERS LIMITED

(2) LUCIANO AICARDI

(3) PARAGON TRUST COMPANY LIMITED

Defendant

RULING

(in Chambers)

Date of hearing: November 28, 2014
Date of Ruling: January 14, 2015

Mr. Timothy Frith, MJM Ltd, for the Plaintiff
Mr. Narinder Hargun, Conyers Dill and Pearman Limited, for the Defendants

Introductory

1. On April 25, 2013, the Plaintiff issued a Generally Indorsed Writ of Summons against the first two Defendants (D1 and D2) seeking various heads of relief. The claims

advanced were based upon the professional dealings of "Marshall Diel and Myers" and D2 with the Plaintiff in 2007 in connection with the purchase of a certain property ("the Property"). On April 8, 2014 the 3rd Defendant (D3) was added by way of amendment and a Statement of Claim was filed in which detailed allegations were made against, *inter alia*, "*the First Defendant('**MDM**')*".

2. After entering an appearance on April 28, 2014 on behalf of D1 and D2, the following day the Defendants' attorneys issued a Summons seeking to set aside service on D3 pursuant to Order 12 rule 8. By Summons dated June 4, 2014, D1 applied to strike-out the claim against it "*on the grounds that it is frivolous, vexatious or an abuse of process*". By Summons dated June 18, 2014, the Plaintiff applied for leave to amend the Writ and Statement of Claim "*to amend the names of the First and Third Defendants*" to:

    (a) "*Marshall Diel & Myers (a firm)*"; and

    (b) "*BCB Paragon Trust Limited*".

3. These three Summonses were heard together. They raised two key broad issues:

    (1) whether the failure to issue proceedings against the firm which was involved in the Property transaction to which the action related, as opposed to D1 (the limited company which was formed by some if not all of the firm's partners after the impugned transaction) either:

        (a) a claim against the wrong party, which could not be cured by way of amendment after the expiry of the limitation period, or

        (b) a simple error of nomenclature which could be cured by amendment at any time;

    (2) whether service on D3 was so defective as to be liable to be set aside or was substantially effective and therefore valid.

The strike-out application

Factual background

4. This application is supported by the May 23, 2014 Georgia Marshall Affidavit which deposes that D1 was incorporated on December 18, 2009 and authorised to commence legal practice from January 13, 2012. Prior to this, a firm Marshall Diel & Myers carried on a legal practice and corresponded with the Plaintiff's former attorneys about the Property and the present dispute in September 2008. D1 did not exist in

2007 and could not have committed the acts complained of, it is asserted. None of this is disputed.

5. The Plaintiff's case, as set out in the Affidavit of Timothy Frith is that:

   (a) Georgia Marshall's affidavit makes it clear that D2 at all material times carried out the legal work complained of on behalf of the firm, which was the intended defendant;

   (b) in naming D1 as First Defendant, "*we have made a minor mistake as to the nomenclature*" of the Defendant;

   (c) D1 has not been misled in any way as its principals are well aware of what entity carried on the legal work in question and there was only one law firm practising under the name "Marshall Diel & Myers' at the material time.

6. In the 2nd Georgia Marshall Affidavit filed in reply, it is deposed that not all of the partners of the former firm are shareholders of the company and not all of the present corporate shareholders are former partners. Permitting the amendment would have the result of adding new parties to the action after the expiration of the limitation period. The deponent also points out that the Plaintiff's own attorneys formerly practised as a firm and then through a company incorporated after the 2009 changes to the Bermuda Bar Act. As a matter of law the Plaintiff must be deemed to have known that D1 could not have been the legal entity involved in 2007 before lawyers were permitted to incorporate by amendments to the Bermuda Bar Act 1974 passed in 2009. The Plaintiff's counsel did not attempt to refute these additional assertions.

Legal principles

7. The governing legal principles are found in paragraph (3) of Order 20 rule 5:

> "*(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.*"

8. Mr. Hargun submitted that a qualifying "*genuine mistake*" had to be limited to the name of the party as opposed to their identity: the "*Sardinia Sulcis*" [1991] 1 Lloyd's Report 201; *International Bulk Shipping and Services Ltd.-v-Minerals and Trading Corporation of India* [1996] 2 Lloyd's Reports 474. In this case the mistake was misleading because it was unclear whether the initial case was based on a case of successor liability; in addition, a conspiracy claim had been pleaded against D1 which could only validly be asserted against a body corporate. It was unjust for the partners of a firm which no longer existed, who had adjusted their rights without reference to

the present claim, to be joined to an action issued at the end of the limitation period and served a year later in circumstances where the delay was unexplained.

9. Mr. Frith responded that the mistake was clearly merely one of nomenclature where the defendant was correctly identified but called by an incorrect name: *Adelson-v-Associated Newspapers* [2007] EWCA Civ 701; [2007] 4 All ER 330; and *Evans Construction Company Limited-v-Charrington & Co. Limited* [1983] QB 810. These authorities clearly supported the application to correct the corporate name of D3, if the application to set aside service failed.

10. In the latter case the English Court of Appeal analysed the cases on the English equivalent of our Order 20 rule 5(3) and applied the same principles to the more widely drafted CPR 19.5(3)(a). Lord Phillips CJ summarised the case law where leave to amend was granted as follows:

> "*57. Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In SmithKline, however, Keene LJ accepted that the Sardinia Sulcis test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment.*"

11. There is also an additional requirement that a post-limitation period amendment would be just, which Mr. Hargun correctly submitted arose under the following provisions of Order 20 rule 5:

> "*(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (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.*"

Findings

12. I am bound to accept Mr. Frith's evidence that his intention was to sue the law entity which acted for the Plaintiff in relation to the 2007 transaction and that a genuine mistake was made as to the legal status and name of that entity. 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 issues 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.

13. However, it does not follow that the mistake, if viewed as merely one of nomenclature, (a) did not mislead the partners of the firm, and that (b) it would be just

to entertain an application to join them undeniably made after any applicable limitation period had come to an end in any event.

14. I find that the mistake was misleading to those partners of the former firm who became aware of the present proceedings when the present proceedings were entered in the Cause Book in late April 2013 at the earliest or, alternatively, when the Writ was served approximately one year later. It was reasonable for the relevant former partners to assume that the Plaintiff did not intend to sue the former firm because, *inter alia*:

    (1) the former firm was not mentioned at all and it would not have been obvious from the entry in the Cause Book that the Plaintiff intended to sue the former firm. It seems probable that those partners in the former firm who are not presently directors of D1 only became aware of the Writ after the limitation period expired when the intention to join the former firm was first articulated;

    (2) it ought to have been obvious to the Plaintiff's legal advisers that D1 did not exist in 2007 prior to the amendments to the Bermuda Bar Act 1974 in 2009 which permitted lawyers to practice through limited liability companies;

    (3) it ought to have been obvious to the Plaintiff's legal advisers that the law firm with which D2 was practising at the material time was the firm, well known to any lawyer in Bermuda in practice at the time, of Marshall Diel & Myers (judicial notice is taken of the fact that Mr. Frith himself was not a member of the Bar until after 2009);

    (4) if the Plaintiff did in fact retain the former firm in relation to the impugned transaction, he would have actually known and/or must be deemed to have known not just the identity but the correct name of the legal entity which he had retained;

    (5) the general indorsement on the Writ referred to the former firm while D1 was named in the title to the action. This suggested a deliberate election to sue D1 in respect of the acts of the former firm. On the other hand, the Statement of Claim, which set out the Plaintiff's considered case, referred throughout to D1 alone, defined in the pleading as "MDM". This appeared on its face to clarify the position: D1 was alleged to be liable for the acts of the former firm;

    (6) the conspiracy claim does not appear to be sustainable against the former firm at all; and/or

    (7) to the extent that the Plaintiff did evince an intention to sue an individual former partner or employee of the former firm in relation to the 2007 transaction, D2 was personally named as a Defendant from the outset. He was referred to as the involved MDM lawyer in the Statement of Claim.

This reinforced the impression that a conscious decision had been made not to sue the former firm and/or all of its former partners at all;

15. It only became clear that the Plaintiff in fact intended to sue the former firm, and not D1, when Mr. Frith swore his Affidavit on June 17, 2014 in response to the strike-out application. That Affidavit avers that instructions were received to issue a protective writ in September 2013, and does not deny that the 2014 amendment application seeks to add the former firm as a party after the expiration of the limitation period applicable to the relevant claims. No explanation is offered for the delay. It is clearly prejudicial to the partners in the former firm to be joined in the present proceedings and deprived of the ability to rely upon a limitation defence which would otherwise be available. The position is broadly the same as regards those partners who have been on notice of the present proceedings and any one or more partners who have not been on notice of the present action.

16. The Plaintiff's former attorneys expressed concern about the transaction in September 2008 and D2 on behalf of the former firm, essentially alleging that the firm had acted for the Plaintiff and then acted in favour of conflicting interests. By letter dated October 16, 2008, D2 denied that the Plaintiff ever retained the former firm in connection with the sale of the Property. There is no suggestion that the Plaintiff himself was not at that point in possession of sufficient information to issue the present proceedings against the firm while it was still in existence. It is impossible to believe that he himself did not fully appreciate that he was dealing with a law firm in 2007 at a time when corporate law firms did not even exist.

17. The present case is accordingly very far removed from the sort of situation which understandably leads to befuddlement about the correct name of a generally identified litigant. The Plaintiff is not a litigant who has dealt with a corporate group with various members in circumstances where it is unclear precisely which group entity entered into a particular transaction or series of transactions, and the true position can only be discovered as a result of complicate investigations by the litigant's professional advisers. The claim was not pursued until the Writ herein was filed in April 2013 to prevent the limitation period expiring. The allegation that an oral retainer agreement was concluded between the Plaintiff and the former firm was first explicitly advanced in the 2014 Statement of Claim; it is difficult to see why the Plaintiff could not have instructed his attorneys to name the former firm when commencing proceedings in 2013. The now apparently time-barred claim has neither been asserted with any conviction nor pursued with any diligence.

18. Two claims are asserted against D1 and sought to be pursued as against the former firm: (a) breach of fiduciary duty, and (b) conspiracy. I accept Mr. Hargun's submission that the proposition of a partnership being party to a conspiracy is legally misconceived. The Defendants' counsel conceded that the breach of fiduciary duty claim was an equitable claim to which limitation defences did not directly apply by virtue of section 37 of the Limitation Act 1984. However he relied upon the well-recognised rule of practice that where equitable claims correspond to similar common law claims, the common law limitation periods will be applied in equity by analogy:

Coultard-v-Disco Mix Club Limited [1999] 2 All ER 457 at 477f-478c (Jules Scher QC); *Paragon Finance PLC-v-Thakerar & Co.* [1999] 1 All ER 400 at 414a-b (Millett LJ). Mr. Hargun also relied upon the following passage in the English Court of Appeal judgment in *Gwembe Valley Development Company Limited-v-Koshy* [2003] EWCA Civ. 1048 (Mummery LJ):

> "*111. In the light of those cases, in our view, it is possible to simplify the court's task when considering the application of the 1980 Act to claims against fiduciaries. The starting assumption should be that a six year limitation period will apply – under one or other provision of the Act, applied directly or by analogy – unless it is specifically excluded by the Act or established case-law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act s 2, 5; see Seguros). By contrast, claims for breach of fiduciary duty, in the special sense explained in Mothew, will normally be covered by section 21. The six-year time-limit under section 21(3), will apply, directly or by analogy, unless excluded by subsection 21(1)(a) (fraud) or (b) (Class 1 trust)…*"

19. Section 23 (3) of the Limitation Act 1984, like section 21(3) of the 1980 UK Act, creates a six year limitation period for actions to recover trust property. Section 37 of the Bermuda Limitation Act 1984 preserves in statutory form, essentially in the same terms as section 36 of the Limitation act 1980 (UK) the approach once taken in equity alone. I find that the Bermudian law position is the same as the English law position and that a six year limitation period applies to the main (and only viable) claim sought to be asserted against the former firm, either directly or by analogy.

20. In all the circumstances the Plaintiff has failed to demonstrate that it would be just to permit him to add a former partnership as 1st Defendant to the present action in circumstances where it is implicitly conceded that the applicable limitation periods which would otherwise be available have now most likely expired. Of course if no limitation period applies at all or any applicable period has not expired, the Plaintiff can issue fresh proceedings against the former firm. Accordingly:

    (1) the application for leave to amend to join Marshall Diel & Myers (a firm) is refused; and

    (2) the claim against D1 is struck out on the grounds that it is hopeless and bound to fail.

D3's application to set aside service of the Writ

Factual background

21. By Summons dated April 29, 2014, D3 sought an Order declaring:

> "*1.that the Generally Endorsed Writ of Summons in the matter herein dated 25 April 2013 (amended 8 April 2014) has not been duly served upon the Third Defendant, Paragon Trust Company Limited (BCB Paragon Trust Limited)…*"

22. Ms. Evernell Davis deposed that she served the Amended 2014 Writ and Statement of Claim and the original 2013 Writ on the following persons:

    (a) on April 16, 2014 at D1's offices, she served one set of documents on Timothy Marshall, who identified himself as a director of D1 and D3, personally as he was in a hurry and left the office. She left a second set of documents, seemingly by way of service on him as a director D3, at D1's reception desk;

    (b) on April 17, 2014 at D2's suggestion she served him personally at D1's offices where he was attending a meeting, rather than at D3's offices as she initially sought to arrange.

23. Mr. Aicardi deposed that he was indeed served with one set of papers and that no mention was made by the process server either orally or in her indorsement of service on the Writ of his capacity as a director of D3. Mr. Marshall deposed that he has not been director of D3 (now known as BCB Paragon Trust Limited) since 2011 and did not accept service on behalf of that entity which has no connection with D1 as it now has other lawyers. He agrees that he accepted service on behalf of MDM even though service was not effected on the company at its registered office. Mr. Neil de Ste Croix deposes that the Writ has not been served by delivery to D3's registered office or by service on any of its directors.

24. It was conceded by the Plaintiff that service had not been effected on D3's registered office in accordance with section 62A of the Companies Act 1981. There was no positive evidence that any service had been effected on a current director of D3 in their capacity as such.

25. No evidence was filed by the Plaintiff explaining why D 3 was only added to the Writ by way of Amendment almost a year after the limitation period arguably expired.

Legal principles

26. Mr. Hargun submitted that to the extent that the Plaintiff sought to cure any irregularity in relation to service under Order 2 rule 1, the appropriate test was the more stringent test applicable to renewing writs after an applicable limitation period had expired: *Leal-v-Dunlop Bio-Processes International Ltd.* [1984] 2 All ER 207 at 215h (Slade LJ); *Amerada Hess-v- CW Rome,* Lexis Nexis Transcript January 19, 2000 (Colman J). In addition, he cited clear authority for the proposition that where one of several defendants was not served with a writ at all in circumstances where the party was given notice of the fact that he was being sued, the non-service was not a mere irregularity but constituted a nullity: *The 'Goldean Mariner'* [1990] 2 Lloyd's Reports 215 at 217-218 (Lloyd LJ). Lloyd LJ's views on this issue were, however, expressed by way of dissent to the contrary majority holding that even non-service could be cured under Order 2 rule 1 as an irregularity, at least in circumstances where the relevant party was served with an acknowledgment of service form but not the writ .

27. However Mr. Frith did not concede that any irregularity as regards service had occurred in circumstances where it was clear that a current director of D3 had been served in his personal capacity so that the company had effective notice of the proceedings. Counsel's central thesis was that service pursuant to section 62A of the Companies Act 1981 was merely directory, not mandatory. He firstly relied on the following dictum of Baggallay LJ in *In re Regent United Service Stores* (1878) 8 ChD. 75 at 80-81:

> "*There is no doubt that the 3rd rule of the General Order provides for a service being made at the registered office of the company but that is not an imperative rule, which is never to be deviated from. I think that the general tendency of all the authorities is to show that if there is such a service as gives full and complete information to everybody to whom information ought to be given, it is sufficient, although provisions and rules of this kind, which are not part of the Act of Parliament, but are merely made for the purpose of carrying it into effect, may not have been literally complied with."*

28. The Plaintiff's counsel also relied upon the following *dictum* from Thesiger LJ (at page 82) in the same case:

> "*Now there have been a great number of cases decided in which the distinction has been recognised between provisions contained in Acts of Parliament (and the same observations would apply to rules made part of Acts of Parliament) which are merely directory, and those which are made by the legislature an absolute condition precedent necessary to the validity of any proceedings to which those provisions refer. And I may say from my own recollection that the tendency of the Court has been to hold provisions such as those contained in the rule to which I have referred to be merely directory, except in cases where it is further provided that in the event of their not being complied with subsequent proceedings shall be invalid.*"

29. The facts in this case were that a winding-up petition was never left at the company's registered office as required by the applicable rules. It was served on a creditor, who had been authorised by a board resolution to represent the company in relation to the winding-up proceedings in which the directors agreed to the initial appointment of a provisional liquidator. At the same board meeting, the petitioner's clerk was instructed to serve the petition on the company's agent who duly "*accepted service of it, and undertook to appear on behalf of the company*." Thereafter, a counsel appeared at the hearing to appoint an interim liquidator on

behalf of the company. The validity of service of the petition was raised after this initial appearance by the company at a subsequent hearing of the petition.

30. This decision was followed in a more modern case upon which Mr. Frith relied, the judgment of Norris J in *Re Bezier Acquisitions Ltd.* [2011] EWHC 3299 (Ch). In this case, the question of whether a statutory service requirement rendered the non-complying act of purported service a mere irregularity or a nullity was held to depend on the consequences intended by Parliament. Norris J relied upon a case which has been frequently followed in the local courts[1], *R-v-Soneji* [2005] UKHL 49, [2006] 1 AC 340, [2005] 4 All ER 321. He held that a notice of intention to appoint administrators was validly served by the directors on the company's solicitors who had been formally instructed to commence administration proceedings, even though the formal requirement to serve such notice at the registered office had not been met: "*There has in the present case been 'such a service as gives full and complete information to everybody to whom information ought to be given.*"

31. Mr. Frith relied upon the permissive language of section 62A itself:

> "***Service of documents***
> *62A A document may be served on a company by leaving it at the registered office of the company or, in the case of a non-resident insurance undertaking the principal office in Bermuda, or in the case of a permit company, the principal place of business in Bermuda from which the company engages in or carries on its trade or business in Bermuda.*"

32. He also submitted, despite the absence of any evidence that any officer of D3 had in fact been served, that service on directors was authorised by the following provisions of Order 65 of the Rules of the Supreme Court:

> "***65/3 Personal service on body corporate***
> *3 Personal service of a document on a body corporate may, <u>in cases for which provision is not otherwise made by any enactment</u>, be effected by*

[1] See e.g.: *Roberts-v-Director of Public Prosecutions* [2008] Bda LR 37 at paragraph 18 (Stuart-Smith JA); *Re an application to enforce an Arbitration Award* [2013] Bda LR 51 at paragraphs 9 to 17 (Kawaley CJ); *Benevides-v-Corporation of Hamilton and Attorney-General* [2014] Bda LR 33 at paragraphs 57 to 58 (Hellman J).

serving in accordance with rule 2 on the president or vice-president of the body, or the secretary or other similar officer thereof." [emphasis added]

33. I accept Mr. Frith's submission that failure to comply with the service requirements of section 62A of the Companies Act 1981 does not necessarily invalidate service. The converse position better reflects the true legal position. Where service is effected by leaving a document at the registered office, it is virtually impossible for the company so served to successfully impugn the validity of service in accordance with the statute. Where a plaintiff departs from the prescribed service procedure, it will be a question of fact in each case as to whether the relevant form of service deployed either:

    (a) is not irregular at all because the fundamental requirements of service have in substance been met (i.e. informing the company that, in the case of originating process, that the proceedings have been actively commenced); or

    (b) is irregular because in more than purely technical terms effective notice of the active commencement of the proceedings has not been given to representatives of the company putting them on notice that unless they participate in the proceedings, default orders may be made against the company.

34. It is doubtful whether Order 65 rule 3 strictly applies to companies registered under the Companies Act 1981, but I need not decide this question as it does not strictly arise on the facts of this case because no officer of D3 was served at all. Be that as it may, depending on the facts in each case, service on a director may be sufficient service on a company as held in *In re Regent United Service Stores* (1878) 8 Ch D 75 and *Re Bezier Acquisitions Ltd.* [2011] EWHC 3299 (Ch). However, in both of those cases, the company unambiguously waived service at its registered office.

35. What is the test for curing any irregularities in service that have occurred after the expiry of a limitation period? I accept Mr. Hargun's submissions in general terms, and adopt the reasoning of Sir John Megaw in *The 'Goldean Mariner'* [1990] 2 Lloyd's Reports 215 at 225-226 on this issue. This reasoning in my judgment applies with equal force to a situation where Order 2 rule 1 is not engaged in the strict sense because the irregularity consists of a failure to comply with service requirements contained in a statute, as opposed to the Rules themselves. Order 2 rule 1 provides in material part as follows:

"*1 (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any*

other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2)Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit." [emphasis added]

36. I see no reason why the principles which govern setting aside service irregularly made after the expiration of a limitation period should be different in the case of a company (where the primary service rules are contained in section 62A of the Companies Act as supplemented by case law on what constitutes substantial service) as opposed to the case of a natural person (where the primary service rules are contained in the Rules themselves as supplemented by case law on what constitutes substantial service). In *The 'Goldean Mariner'* [1990] 2 Lloyd's Reports 215, the English Court of Appeal apparently assumed that Order 2 rule 1 was engaged despite the fact that the validity of service exclusively concerned service on bodies corporate abroad. The Plaintiff's counsel did not suggest the position adopted by this Court should be different.

37. The relevant considerations, then, are primarily:

(i) whether there is good cause or good reason for curing the irregularity after the expiry of the limitation period, by analogy with the position on an application to renew a writ;

(ii) whether the defects in service caused any prejudice to the party served in an irregular manner.

38. As stated by the learned editors of the *1999 White Book* at paragraph 6/8/6, the first stage of the analysis is (i); if good reason for the delay is shown, attention is then turned to (ii), the balance of prejudice and hardship. Examples given of good reasons for allowing the limitation period to pass are:

"*(a) a clear agreement with the defendant that service of the writ is to be deferred;*

(b)impossibility or great difficulty in finding or serving the defendant, particularly if he is evading service."

Findings

39. I find that an irregularity occurred as regards service on D3 in that:

(a) the Amended Writ was not served at D3's registered office and no alternative form of service was expressly agreed by the company;

(b) D3 did not in any way prevent the Plaintiff from serving process at its registered office;

(c) there is no credible evidence that any attempt to explicitly serve an actual director on behalf of the company took place. There is credible evidence that the process server believed that Timothy Marshall was a director of the company, but no credible evidence that he represented to the process server that he was authorised to accept service on behalf of the company. As in fact Timothy Marshall was only a director of D1 and not a director of D3, it seems more likely than not that he accepted service on behalf of D1 and not D3;

(d) the fact that the process server left a second set of service documents at D1's reception desk constituted no more than an irregular attempt to bring the proceedings to the attention of D3 based on the mistaken belief that Timothy Marshall was a director of D3. It afforded no effective notice to D3 that it had been served;

(e) the only actual director of D3 who was served (D2) was served with one set of documents and he was also a defendant in his personal capacity. There is no evidence that he was told that he was being served in both capacities or that he represented to the process server that he was willing to accept service on D3's behalf. It is more likely than not that Mr. Aicardi was served in his personal capacity as D2;

(f) as D2 was not an officer of D3, no question of valid service in accordance with Order 65 rule 3 arises;

(g) against this confused background, although D3 had constructive knowledge of the existence of the proceedings, there was no reasonable basis for the Plaintiff's legal advisers or D3 to believe that D3 had been validly served. Such confusion occurs not infrequently in cases involving multiple defendants and the challenges of effecting service smoothly are only exacerbated when (1) bodies corporate are involved and (2) the agents of the company are acting

in multiple capacities. Section 62A of the Companies Act 1981is designed to cut through this potential forest of difficulties;

(h) the service situation as regards D3 cried out for confirmation to be sought by the Plaintiff from an agent of D3 expressly acting on the company's behalf to confirm that D3 accepted that valid service had been effected. No such confirmation was sought or given.

40. It was not disputed that both the purported service and the addition of D3 to the Amended Writ both took place in April 2014 after the expiration of six years from the date of the breach of duty complained of in late April 2007. The Plaintiff is required to demonstrate some good reason for depriving D3 of the benefit of a potential limitation defence which explains why he was unable to join and serve D3 until nearly seven years after the events which form the subject of his claim. The Plaintiff personally filed no evidence at all. The Affidavit of Timothy Frith deals with the case against D3 in the following way:

(a) it is deposed in paragraph 4 as follows:

"*We were instructed to issue a Protective Writ in this matter in April 2013 and to serve an Amended Generally Endorsed Writ of Summons that included Paragon Trust Company Ltd as a further Defendant in March 2014.*";

(b) in paragraphs 18 to 24, the case for correcting the error of nomenclature in relation to D3 is clearly and convincingly put. An email is exhibited from Sinclair Realty to the Plaintiff dated June 10, 2008 advising him of the sale of the Property to a third party on May 29, 2007, based on public records.

41. No cause or reason, let alone a qualifying good cause or reason, was advanced for the delay in seeking to join D3. This was undoubtedly because no good cause or reason for the delay existed or could plausibly be advanced. It was admitted that the Plaintiff at the very latest was actually aware of the sale of the Property to D3 on June 10, 2008. The Plaintiff probably had constructive notice of the sale when the conveyance and related mortgage were registered, presumably at some point after May 29, 2007.

42. D3's application to set aside service succeeds on the grounds that D3 was not validly served and no good cause or grounds exists for permitting the Plaintiff to cure the irregularity in circumstances where such relief would potentially deprive D3 of a limitation defence.

Conclusion

43. The application for leave to amend to substitute the former law firm of Marshall Diel & Myers for D1 (Marshall Diel and Myers Limited) is refused. Although technically the mistake qualifies as one of nomenclature, on the facts of the present case the mistake is barely distinguishable from a mistake as to identity. In any event, the failure to name the former firm rather than its corporate successor was misleading and it would be unjust to allow the amendment despite the apparent lapse of the relevant limitation period after so many years of unexplained delay. The Plaintiff has validly served the former partner most intimately involved in the impugned transaction and may pursue his claim against D2 in any event.

44. The application on the part of D3 (BCB Paragon Trust Limited-incorrectly named in the Amended Writ as "Paragon Trust Company Limited") to set aside service is allowed. The amendment to join D3 was made and service purportedly effected almost a year after the expiration of the limitation period the Plaintiff instructed his attorneys to preserve by filing the original Writ in April 2013. Process was not served at D3's registered office and no alternative form of service was accepted by the company. No good cause for waiving the irregularity after the expiry of the limitation period was shown by the Plaintiff.

45. Unless application is made by letter to the Registrar to be heard as to costs, the Plaintiff shall pay the costs of D1 and D3, to be taxed if not agreed.

Dated this 12th day of January, 2015 _____

IAN R.C. KAWALEY CJ