IN THE COURT OF APPEAL

SAINT LUCIA

CIVIL APPEAL NO.2 of 1975

BETWEEN: NORMAN WALCOTT Appellant

AND

MOSES SERIEUX Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

K. Monplaisir for appellant.
H. Giraudy for respondent.

1975, October 14, 15 & 20

J U D G M E N T

PETERKIN, J.A.

The brief facts which have given rise to this appeal are as follows: On the 25th day of July 1972 the appellant brought an action against the respondent for damage done to his motor van No.401 on the 12th day of March 1972, as a result of the negligent driving of the respondent.

The appellant in his statement of claim stated that he was at all material times the owner of the said van and the respondent in his defence admitted that the appellant was the owner of the motor van.

Despite the state of the pleadings as mentioned above, the appellant at the trial gave the following evidence:

> "I live at La Clery, Castries. I know the defendant. I owned a pick-up registration no.401. I would call it a truck. It belonged to the company of which I am a director. It belonged to Walcott's Construction Co. Ltd. It was so owned by the company in March 1972."

At that stage counsel for the appellant submitted that in view of this evidence it was clear that the wrong plaintiff was before the Court and sought leave to amend the writ by substituting Walcott Construction Co. Ltd. as the plaintiff in the action. The learned trial judge heard arguments from both counsel in the case and ruled

as follows:

> "Court rules that application for substitution of another person as plaintiff cannot be entertained. In the result both action and counterclaim are dismissed. There will be no order as to costs."

It is from this Order that the appellant now appeals. The grounds of appeal are as follows:

> "1. That the learned judge was wrong in law in holding that no amendment could be allowed to substitute a plaintiff in an action.
>
> 2. That the learned judge was wrong in law in refusing to allow an application to amend the writ by substituting the plaintiff for another.
>
> 3. That the judgment of the learned judge was wrong and ought to be set aside and a new trial between a substituted plaintiff, viz. "Walcott Construction Limited", and the defendant/respondent ordered."

Counsel for the plaintiff/appellant referred the Court to Order 15, Rule 6, and Order 20, Rule 5, of the Rules of the Supreme Court and pointed out that they were identical with the English Rules of the Supreme Court. He then cited the cases of Rodriguez v. Parker (1966) 2 All E.R.349, and Sterman v. E.W. & W.J. Moore Ltd. (1970) 1 All E.R.581, and, relying on the former case cited, he then submitted that if the Court were satisfied (1) that the mistake sought to be corrected was a genuine mistake; (2) that the mistake was not misleading nor such as to cause any reasonable doubt as to the identity of the person intended to be sued; (3) that it was just to make the amendment; and that the three criteria mentioned in that case could be applied to the facts and circumstances of the instant case, that the Court ought to grant the amendment.

He further submitted that the amendment was granted in the Rodriguez case even though it had the effect of extending the validity of the writ.

The facts of that case are as follows:

"On October 30, 1961, the plaintiff was injured by a motor van driven by R.S. Parker, the son of its owner, R.J. Parker. On June 11, 1964 a writ was issued on the plaintiff's behalf in which the defendant was mistakenly described as R.J. Parker. The claim was for damages for personal injuries. The writ was served on Jan.4, 1965, by which time the limitation period had expired. In July, 1965, the defence was delivered; it included a denial that the defendant was driving the van. On Jan. 17, 1966, an order was made under R.S.C., Ord.20, r.5 (see particularly para.(2)) for amendment of the writ by substituting R.S. Parker as defendant."

Learned counsel for the defendant/respondent submitted that the amendment sought was not permissible either by the law of England or by the law of St. Lucia because the period of limitation had already set in, namely, three years.

In support of his contention he cited, among others, the cases of (i) Mabro v. Eagle Star and British Dominions Insurance Co. Ltd.(1932) 1. K.B. 485; (ii) Braniff v. Holland & Hannen and Cubitts Ltd.(1969) 3 All E.R.959; (iii) Lucy v. Henleys (W.T.) Telegraph Works Co. Ltd. (1969) 3 All E.R.456.

He also referred the Court to Articles 2122 and 2129 of the Civil Code, and submitted that whereas in English law the Limitation Acts are procedural, in St. Lucia the right as well as the remedy is extinguished. Article 2129 reads as follows:

"In the cases mentioned in Articles 2111, 2121, 2122, 2123 and 2124, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them."

The action in the instant case falls under Article 2122.

Returning to the three criteria mentioned in the Rodriguez case, the first question I ask myself is whether the error of citing the wrong plaintiff in the instant case is the sort of mistake envisaged by this authority. In that case it would be seen that all that was required was to correct the initials of the name of the defendant, whereas in the instant case the substitution of a new and different plaintiff is sought. This is not correcting the name of a party; it is not a matter of mistake. In the Lucy case mentioned above Megaw L.J. stated as follows:

> "I am unaware of any case in which leave to amend a writ has been given in such circumstances; namely, where the joinder of a new defendant would be calculated to defeat a right as to limitation which he would have had if an action were to be brought by the plaintiff against him alone."

Further to this, a close study of the ratio decidendi in the Rodriguez case discloses that Nield J. held that the Limitation Acts in England can properly be regarded as dealing with practice and procedure rather than conferring substantial rights. Indeed at page 363 of his judgment we find these words:

> "the benefit which a defendant derives from the Statute of Limitations is not I think properly described as a substantive benefit but really merely as a right to plead a defence if he chooses to, so that the plaintiff is barred from prosecuting his claim."

In exercising his discretion in favour of the plaintiff and allowing the amendment in that case the learned judge found it necessary to go further and exercise his discretion to extend the validity of the writ.

In Article 2129 quoted above, both the right and the remedy are extinguished, and therefore there is no question of a party being called upon to choose whether he would plead the defence of limitation. As long as the evidence in a case discloses that the period of limitation has

expired, the judge has no discretion in the matter. In the instant case to have allowed an amendment would have meant that the substituted plaintiff would have been instituting proceedings out of time.

I would therefore dismiss the appeal. The respondent should have his costs to be taxed.

N. A. PETERKIN
JUSTICE OF APPEAL

MAURICE DAVIS C.J.

I agree.

MAURICE DAVIS
CHIEF JUSTICE

ST. BERNARD J.A.

I also agree.

E.L. ST. BERNARD
JUSTICE OF APPEAL