SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 of 1986

BETWEEN:

GIRAUDY ESTATES LTD. - Defendant/Appellant

and

EGBERT FRANCIS - Plaintiff/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Mr. H. Giraudy for the Appellant
Mr. C. Rambally for the Respondent

1988; Jan. 26
May 9

JUDGMENT

BISHOP, J.A.

Egbert Francis, a mechanic, was injured while travelling in the bucket of a front end Loader driven by Joseph Jn. Baptiste. That occurred on the 23rd February 1978.

On the 18th February 1980, a Writ of Summons endorsed with a Statement of Claim was filed on behalf of Egbert Francis against Giraudy Estates Limited, a company incorporated under the Commercial Code, and Joseph Jn. Baptiste. The Statement of Claim read, in part, as follows:-

> "1. The plaintiff is and was at all material times hereto a mechanic and welder by profession.
>
> 2. On February 23rd 1978, the second-named defendant so negligently controlled the bucket of a front end loader.......owned by the first-named defendant as to cause the said bucket...... to cause serious injury to the plaintiff whereby the plaintiff suffered damage................."

Particulars of Damage and of Negligence were then set out.

In March 1980, the solicitors for the defendants entered appearance, and about a month later filed this defence-

> "1. Paragraph 1 of the Statement of Claim is admitted.
>
> 2. (a) The defendants admit the injury alleged......and deny that the same was caused through the defendant's negligence.
>
> (b) The defendants further state that the plaintiff........came by his

/injury.....

> injury by his own negligence in a moving part of the bucket of the loader, and signalling to and causing the second-named defendant to tilt the said bucket upwards whereby the plaintiff's hand suffered injury.......
>
> 3. Save as is herein specifically admitted, the defendants deny each and every material allegation in the Statement of Claim as if the same had been herein set out seriatim and specifically denied."

There was a Summons for directions dated 23rd December 1980 on the Record but nothing seemed to have been done about it.

In August, 1982, Egbert Francis filed a notice of change of solicitor and the second solicitor filed an amended Statement of Claim on the 29th September 1982. Only paragraph one of the Statement of Claimed remained as endorsed on the Writ of Summons. The other paragraphs, as amended, read:-

> "2. The plaintiff was at all material times the servant and or agent of the first-named defendant and was acting in the course of his employment with the first-named defendant.
>
> 3. The second-named defendant was at all material times the servant and or agent of the first-named defendant and was acting in the course of his employment with the said first defendant.
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> 4. On or about the 23rd day of February 1978, the second-named defendant whilst in the course of the said employment and in the control of a front end Loader......owned by the first-named defendant so negligently drove, managed and or controlled the same as to cause injuries to the plaintiff.
>
> 5. ....
>
> 6. Further or alternatively the injuries suffered by the plaintiff were caused by the negligence of the first-named defendant."

Thereafter Particulars of the negligence of the secod-named defendant and of the negligence of the first-named defendant were itemised, as were Particulars of injuries and of special damages.

The Record revealed that the next thing which occurred was the trial before Matthew J. on 15th and 24th days of July 1986.

At the outset of the trial, Counsel for the defendants took a point in limine. The ruling was reserved and given on the 30th September 1986 after evidence was adduced from which the plaintiff was awarded damages and costs against the defendant Company and the driver Joseph Jn. Baptiste.

/Giraudy Estates......

Giraudy Estates Limited was dissatisfied and appealed on the 24th October 1986, giving the following ground for so doing:-

> "The learned trial Judge erred in granting leave to amend the Statement of Claim after the lapse of three years from the date of the accident, and the consequent absolute extinguishment by Article 2129 of the Civil Code of any right of action in delict which the plaintiff/respondent may have had against the defendant/appellant, and in so doing, denying the defendant/appellant the defence of negative prescription under the said Article."

The point in limine was - as set out by Matthew J. - that the original Statement of Claim endorsed on the Writ of Summons did not disclose a cause of action against Giraudy Estates Limited, and the amendment thereto, filed more than 3 years after the incident in which Egbert Francis was injured, sought to cure that omission. However, Counsel submitted, by virtue of Article 2122 of the Civil Code, the action against the Company was prescribed, and under Article 2129 of the said Code, that prescription was substantive. Learned Counsel relied upon a number of cases (including WALCOTT v. SERIEUX Civil Appeal No. 2 of 1975 of St. Lucia), which, with Order 20 Rule 3 of the Rules of Supreme Court 1970, and pertinent facts, were considered by the trial Judge before he ruled that the point must fail.

In his reasons for so ruling, the trial Judge stated that it could not be said that a new cause of action was being advanced by the amended Statement of Claim. In his words·

> "The same cause of action has always been present, namely an action for negligence."

He also held:-

> "That the defects to the specially endorsed Writ.........were mere irregularities which were cured by the first-named defendant's unconditional appearance and defence filed on March 31, 1980 and May 5, 1980.respectively......
>
> Further, the amended Statement of Claim filed on September 27, 1982, may very well be entertained since to do so........would in my view not run contrary to the decision of WALCOTT v. SERIEUX."

Matthew J. observed that the case was conducted on the basis that the plaintiff could amend his Statement of Claim without leave; and he continued thus:-

> "If this is so, authority for so doing must have been found under Order 20 r.3. I would have thought that leave would have been required but since I would have granted such leave as a matter of course, the matter should probably be looked at as though leave was in fact granted if it was at all necessary."

/Before this......

Before this Court Counsel for the appellant submitted that the Statement of Claim on the Writ of Summons disclosed a cause of action in negligence against Joseph Jn. Baptiste alone. Using as his definition of "cause of action", that "there must be an act by the defendant which gives cause for complaint", Counsel contended that there was no allegation of an act by Giraudy Estates Limited. The sole allegation by the plaintiff was that the Company was owner of a vehicle; and "mere ownership per se was not a cause for complaint". Further, it was not pleaded that when Joseph Jn. Baptiste drove the front end Loader negligently he was then acting as the servant or agent of Giraudy Estates Limited.

Counsel also pointed out that the first time an attempt was made to amend the Statement of Claim to allege "vicariousness" was more than 3½ years after the injury was sustained. He argued that (1) the very fact that an amended pleading was filed indicated that the plaintiff conceded that the initial pleading was inadequate in not alleging vicarious liability; and (2) it was not open to the trial Judge to grant leave to amend the Statement of Claim. Articles 2122 and 2129 of the Civil Code barred both the right and the remedy, and unlike the law of England, the limitation article of St. Lucia was substantive law. So that at the date of filing of the amended Statement of Claim and at the time of trial of the case the limitation period had passed.

Mr. Giraudy submitted also that Order 20 Rule 3 of the Rules of Supreme Court, referred to by Matthew J., was not relevant, and that the only rule which might have been considered, but could not be invoked, was Order 20 Rule 5(5). This rule permitted an amendment (where application for leave to amend was made to the Court) "notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

Learned Counsel contended that there had to be an existing cause of action before a new cause of action could be added or substituted, and provided the new cause of action arose out of the same or substantially the same facts as the existing one. In Counsel's words "the existing cause of action is the hook on which to hang the new cause of action; if there is no hook you cannot hang the new cause of action". Here, there was no existing cause of action against the appellant and so amendment was out of the question.

Learned Counsel for the respondent did not challenge or disagree with the definition of "cause of action" given by Mr. Giraudy; but he submitted that (1) the Statement of Claim endorsed on the Writ disclosed a cause of

/action......

action against Giraudy Estates Limited though it may have omitted particulars which could have been sought, if necessary; (2) Paragraph 2 of that Statement of Claim raised the issue of vicarious responsibility (3) by entering an unconditional appearance and filing a defence the Company had made the issue of negligence clear; had there been no defence filed it may have been a different situation; and (4) the amended Statement of Claim was not a new cause of action.

Mr. Rambally conceded that, as pleaded in the defence, the Company did not admit either ownership of the vehicle or the existence of any agency between the defendants; and also that leave of the Court to amend the Statment of Claim was necessary. However he stressed that despite the absence of evidence that leave had in fact been granted, the learned Judge accepted the amendment and dealt with it at the trial.

Counsel for the respondent also submitted that the Judge was empowered by Order 20 Rule 5 of Rules of Supreme Court to amend the Writ and the Statement of Claim at any time - even after the expiration of the prescribed limitation period; and that in the instant case the purpose of amending was two-fold: (a) to correct a deficiency in the original Statement of Claim and (b) to give the company a greater opportunity to prepare for the trial.

In deciding this appeal I consider the following:

1. STATEMENT OF CLAIM.

Clearly the only reference in the Statement of Claim (endorsed on the Writ of Summons) to Giraudy Estates Limited was in the second paragraph; and there it was alleged as a fact that the front end Loader was owned by that Company. No act on the part of Giraudy Estates Limited was pleaded in February 1980.

I must agree with Counsel for the appellant that the mere allegation of ownership did not disclose a cause of action against the appellant.

I am unable to find any allegation of vicarious liability in paragraph 2.

2. THE DEFENCE.

This pleading showed that Giraudy Estates Limited (i) admitted that Egbert Francis was injured (ii) denied that the injury was caused through negligence on its part, (iii) alleged that the injury was caused by the negligent act of Egbert Francis himself and (iv) denied specifically each of the other material allegations in the Statement of Claim.

With respect, I must disagree with Counsel for the respondent that the filing of the defence or the facts pleaded therein made a difference to the claim.

/3.THE AMENDMENT......

3. THE AMENDMENT.

When the pleadings were deemed closed there had been no amendment to the Statement of Claim. Mr. Rambally readily conceded that leave of the Court, to amend, was required.

Now under Order 20 r. 5(5) of Rules of the Supreme Court 1970, amendment would not be allowed unless there was already in existence a cause of action, and then any new cause of action to be added or substituted, would have to arise out of the same or substantially the same facts as those giving rise to the initial cause of action.

Again, it seemed clear to me that the amendment was not intended to give the Company a greater opportunity to prepare for the trial. In my view the solicitor to whom the plaintiff changed in August 1982, appreciated that the endorsement omitted any allegation of fact that disclosed a cause of action against Giraudy Estates Limited, and set about correcting the failure. So that what was called an amended Statement of Claim was really an original claim so far as it applied to Giraudy Estates Limited. Significantly, however, it was filed 3 years, 7 months after Egbert Francis was injured.

In my view, since initially there was no cause of action disclosed against the appellant then no amendment could be permitted under Order 20 Rule 5(5).

4. ARTICLES 2122 and 2129 OF THE CIVIL CODE.

The relevant parts of these Articles read as follows:

> "2122. The following actions are prescribed by three years:
>
> 1. ....
>
> 2. For damages resulting from delicts or quasi-delicts whenever other provisions do not apply;
>
> 3. ....
>
> 2129. In all the cases mentioned in Articles 2111.......2122.........the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired....."

The application of these Articles was considered by the Court of Appeal in Civil Appeal No. 2 of 1975 NORMAN WALCOTT v. MOSES SERIEUX. In that case there was evidence that the wrong plaintiff was before the Court. The plaintiff ought to have been WALCOTT CONSTRUCTION COMPANY LIMITED; and so leave was sought to amend the Writ by substituting the Company for Norman Walcott, as plaintiff. The trial Judge decided that an application to substitute another person as plaintiff could not be entertained, and he dismissed the action. The matter was taken on appeal, based on the

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following two of three grounds: "1. That the learned Judge was wrong 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". The judgmentof the Court of Appeal was delivered by Peterkin J.A. (as he was at that time). It was made clear that the Court had to consider, among other things, the submission "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".

Dealing with the law of St. Lucia, Peterkin J.A. mentioned Article 2122 and quoted Article 2129 of the Civil Code. He pointed out that the substitution sought was not to correct the name of the existing plaintiff but to put a new and different person as plaintiff and that the action before the Court fell within Article 2122. Then the judgment continued:-

> "In Article 2129 quoted above, both the right and the remedy are extinguished and......there is no question of a party being called on to choose whether he would plead the defence of limitation. As long as......the period of limitation has expired the Judge has no discretion in the matter."

Therein lies a principle involving the application of Articles 2122 and 2129 of the Civil Code. Put in other words, in certain specified actions, after a period of 3 years has elapsed, then the right and the remedy are automatically lost and unavailable; and the Judge must so find.

In the instant case, the right and remedy initially available to Egbert Francis when he was injured were extinguished by August 1982, three years and seven months having elapsed. He could not pursue a cause of action for damages, in respect of the personal injuries suffered, against Giraudy Estates Limited, as his solicitor purported to do by filing an "Amended Statement of Claim".

Consequently for all the reasons given, the appeal must be allowed with costs; and I would so order, with great reluctance.

E.H.A. BISHOP,
Justice of Appeal

SIR LASCELLES ROBOTHAM, Chief Justice

I agree that the appellant Giraudy Estates Limited must succeed c

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this appeal. It is no fault of the plaintiff/respondent that his action has finally resulted in his holding a Judgment against Joseph Jn. Baptiste only, which could well prove to be an empty one. I trust that the appellant Company will not allow the respondent to be left out in the cold in respect of the injury the trial Judge found he had received at the hands of the appellant's driver, who was at the relevant time operating the appellant's front end Loader.

L.L. ROBOTHAM,
Chief Justice

I agree.

G.C.R. MOE,
Justice of Appeal.