GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 1996

BETWEEN:

GARNET ROSS - APPELLANT

and

SHIRLAND ST. CLAIR
MAURICE COX -
RESPONDENTS

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert.N.J. Matthew	Justice of Appeal[Ag.]

Appearances:

Ms. Rita. Joseph for the Appellant.
Mr. Anselm Clouden for the Respondents.

1998: February 25

JUDGMENT

MATTHEW, J.A. [Ag.]

On July 13, 1988 a motor vehicle collision occurred between the appellant's motor car and the first respondent's motor truck. But it was not until March 1, 1995 that the appellant instituted a claim for negligence arising from the collision. On March 30, 1995 a defence was filed on behalf of the respondents where they in effect denied the

allegations in the statement of claim but they did not plead that the action was barred by virtue of the provisions of the Limitation of Actions Act.

On May 30, 1995 learned Counsel for the appellant requested the mailer be set down for trial. However on June 29, 1995 learned Counsel for the respondents filed a summons in chambers asking for an order that the action be struck out by virtue of the provisions of the Limitation of Actions Act or in the alternative that leave be granted to amend the defence to in effect plead the provisions of the Limitation of Actions Act.

St. Paul, J. in a written judgment delivered on February 16, 1996 stated that he would not strike out the action but would allow the amendment prayed for in the summons. He ordered costs in the cause.

The appellant has appealed against that decision on three grounds as follows:-

(1) The learned trial Judge erred in law when he gave the respondents liberty to amend their defence to plead the Limitation of Actions Act Cap. 173 as he failed to consider properly or at all the principles on which a court will allow such an amendment.

(2) The learned trial Judge erred in law when he failed to consider properly or at all the full effect of the relevant provisions of the Limitation of Actions Act Cap. 173

(3) The learned trial Judge wrongly exercised his discretion to award costs in favour of the respondents contrary to the established general principle that an applicant seeking an amendment bears the costs.

We had the opportunity to read the skeleton arguments of Counsel for the appellant and Counsel for the respondents. In addition we heard Counsel for the appellant on grounds 1 and 2. We did not find it necessary to reserve our judgment. I shall now proceed to deal with the grounds of appeal.

Ground 3

That ground of appeal is unarguable. In our view the correct order that should have been made was that the respondents should bear the costs consequent upon the amendment which they sought.

Grounds 1 and 2

It is not disputed that the authority to grant amendment of writs or pleading is a discretionary one vested in the judge. Learned Counsel for the appellant readily adopts that for one of her criticisms of the judgment is that no where in it is Order 20 Rule 5 mentioned

Counsel cited **The Supreme Court Practice Vol. 1 (1995)** para 20/5-8/6 which lays down the general principles. It states,

> AIt is a guiding principle of cardinal importance on the question of amendment that generally speaking all such amendments sought ought to be made for the purpose of determining the real question in controversy between the parties....
>
> ALeave readily granted on payment of costs occasioned unless the
>
> opponent will be placed in a worse position than he would have been if the amended pleading had been served in the first instance.@

It seems to me that the appellant in this case was not placed in any worse position after the grant of the amendment than he would have been if the amended pleading had been served in the first instance.

The case of **KETTEMAN v HANSEL PROPERTIES LTD. 1988 1 AER 38. 48 H.L.** recognizes that whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application even though the discretion is one that falls to be exercised in accordance with well-settled principles.

Lord Keith states Athe rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs.@

He referred to a dictum of Brett M.R. in **CLARAPEDE & Co.** v **COMMERCIAL UNION ASSOCIATION 1883** where the Master of the Rolls stated:-

> AThe rule of conduct of the court in such a case is that however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs, but if the amendment will put them into such a position that they must be injured, it ought not to be made.@

Lord Keith states that the sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject matter of the proposed amendment at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed.

The timing of the application of the amendment is important. The appellant had set down the matter for hearing on May 30, 1995 and it was on June 29, 1995 that the respondents took out the summons seeking, inter alia, the amendment of their defence, that is before the trial date was contemplated and quite unlike the factual situation in *Ketteman's* case.

I think the learned Judge was well within his discretion to accede to the amendment sought and that he exercised his discretion properly save that he made the wrong order in respect of costs.

In the circumstances I dismiss grounds 1 and 2 and allow ground 3 of the appeal.

The appellants shall be allowed one half of the costs of the appeal to be agreed or otherwise taxed in addition to all his costs thrown away subsequent to the filing of the respondents' defence on March 30, 1995.

Albert N.J. Matthew
JUSTICE OF APPEAL [Ag.]

C.M. Dennis Byron
I Concur CHIEF JUSTICE [Ag.]

Satrohan Singh
I Concur JUSTICE OF APPEAL