GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 OF 1998

BETWEEN:

MOVING TARGET LIMITED
CARLA BRIGGS **APPELLANTS**

and

JOHN LAYNE **RESPONDENT**

Before: The Honourable Mr. Satrohan Singh **Justice of Appeal**
The Honourable Mr. Albert Redhead **Justice of Appeal**
The Honourable Mr. Albert Matthew **Justice of Appeal (Ag.)**

Appearances: Dr. Francis Alexis for the appellants
Mrs. Winifred Duncan-Phillip for the respondent

[February 22, March 22, 1999]

JUDGMENT

SATROHAN SINGH JA

This appeal germinated from an interlocutory order made by **St. Paul J** on May 22, 1998 in a libel suit brought by the respondent against one Errol Maitland as owner and publisher of the Grenada Informer Newspaper, and the second named appellant Carla Briggs. By that order, the Learned Judge, on the written application of Errol Maitland, removed the name of Errol Maitland as a defendant from those proceedings, and, on the oral application of the respondent substituted therefor the name Moving Target Limited, the first named appellant.

The centre of gravity of the appeal is the question whether **St. Paul J** was correct in responding favourably to the substitution requested by the respondent, when in doing so, he may have been depriving the first named appellant of a defence under the **Limitation Act,** had the respondent sought to bring fresh

proceedings against this appellant on the same cause of action. The Learned Judge made the substitution on the ground that the amendment sought was only to correct the name of a party: The rule relied on by the trial judge when he granted the application was to be found in **Order 20 R 5 of the Rules of the Supreme Court 1970** which so far as is material, provides as follows:

> 5 "(1) Subject to Order 15, rules 6,7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
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> (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.
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> (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.

THE ISSUES:

At the hearing of the appeal, it was not disputed that the respondent made a mistake when he named Errol Maitland instead of Moving Target Ltd., as the proprietor, printer and publisher of the impugned newspaper. The issues for our determination are (1) whether or not the mistake was a genuine mistake that was not misleading, or such as to cause any reasonable doubt as to the identity of the person

intended to be sued and (2) whether the amendment should have been made when to do so would have been to deprive the first named appellant of a possible complete defence under the Limitation Acts, had he been sued in a fresh suit.

THE MISTAKE:

Addressing the issue of the mistake, the transcript before us disclosed that the suit in this appeal was filed on October 1, 1993 with the first named defendant being Errol Maitland. On October 28, 1993, a statement of claim was filed. Therein, it was disclosed that Errol Maitland was being sued as the owner and publisher of the "Grenada Informer." In the teeth of this pleading was the existence of a statutory declaration made pursuant to the **Newspapers Ordinance Cap 197** and declared to by the Secretary of the first named appellant on November 15, 1985, wherein it is stated that the first named appellant was and is the proprietor, printer and publisher of the aforesaid newspaper. Given those facts, it is clear that at no time was Errol Maitland the owner and publisher of the newspaper.

In response to the statement of claim, Errol Maitland filed his defence on November 12, 1993. Therein, and despite the statutory declaration, he admitted that he was the owner and the publisher of the Grenada Informer. It was not until he filed his application to strike out, in 1998, after the limitation period for the launching of a libel suit had expired, did he disclose that the first named appellant was really the owner and publisher of the said newspaper. It was at that stage that the respondent applied that Moving Target Ltd. be substituted for Errol Maitland as the owner and publisher of the newspaper.

From these disclosures, it is reasonable to conclude: (1) that at all times the respondent intended the first named defendant in the suit to be the owner and

publisher of the Grenada Informer, (2) that he was under a mistaken perception as to who that person was and (3) that mistaken perception was compounded by the filed defence admitting that Errol Maitland was that person. It was disclosed to this Court that Errol Maitland is a Director of Moving Target Ltd., more or less the alter ego of the company, yet despite the statutory declaration, he made this admission in his defence.

Given these circumstances, it is reasonable to assume that confusion in the mind of the respondent must have been manifest and must have been agitated by the defence filed by Errol Maitland. I therefore cannot conclude that the mistake which was corrected by St. Paul J, was not a genuine mistake or was such as to cause any reasonable doubt to Errol Maitland or the first named appellant as to the identity of the person intended to be sued. The respondent, when he erroneously inserted the name Errol Maitland as a defendant, intended to sue the owner and publisher of the newspaper. That is patent from his statement of claim. Such owner and publisher is the first named appellant. This was a fact which must have been well known to both Maitland and the first appellant. I therefore agree with the learned trial judge that the application before him was merely to correct the name of a party.

THE LIMITATION POINT:

Addressing the issue of the denial of the first named appellant of the possible availability of a defence under the Limitation Acts should the amendment be granted, giving a literal interpretation without more, to the simple words used in **O 20 R 5** as **St. Paul J** obviously did, there appears to be no difficulty in determining the appeal. As I understand the rule, simply put, **RSC Order 20 R 5** gave the Court power in a case of mistaken identity, to substitute a new defendant for the

defendant originally sued, notwithstanding that a relevant period of limitation had expired. However, decisions emanating from the Courts in England, have made the issue one of a thorny nature. These decisions show the Courts in England indulging in judicial confusion in their application of the rule.

Prior to the existence of this rule, there was a long line of authority which show that once a person had acquired the benefit of a Statute of Limitation, he was entitled as of right on retaining that benefit and that the Court would not deprive him of that benefit by allowing an amendment of the writ or of the pleadings. **[See Mabro -v- Eagle Star and British Dominions Insurance Co., Ltd. (1932) All ER Rep. 411: Davies -v- Elsby Brothers Ltd. (1960) 3 All ER 672: Hilton -v- Sutton Steam Laundry (1945) 2 All ER 425.** However, in **Mitchell -v- Harris Engineering Co. Ltd., (1967) 2 All ER 682, Master of the Rolls Denning**, disagreed with the dicta in those cases which spoke of a defendant having a "right" to the benefit of the Statute of Limitations which "right" should not be taken away from him by amendment of the writ. He opined that the Statute of Limitations did not confer any right on a defendant. It only imposed a time limit on the plaintiff within which he should bring his suit.

Then**,** in **Yew Bon Tew -v- Kenderaan Bas Mara (1982)** 3 **All ER 833 Lord Brightman** in her Majesty's Privy Council, did not accept as correct the generality of this proposition of **Lord Denning**. In the opinion of their Lordships, said **Lord Brightman**, “an accrued entitlement on the part of a person to plead lapse of a limitation period as an answer to future institution of proceedings is just as much a right as any other statutory or contractual protection against a future suit. With this, I agree. That was a case that dealt with the effect of retrospective legislation which purported to deprive a defendant of a benefit under the Limitation

Acts. Finally in **Mitchell's case, Russell L J** in dealing with the question whether or not **O 20 R 5** was ultra vires the **Limitation Acts**, said at p 687.

> "On the question of ultra vires, I accept that the Rules of the Supreme Court are limited to matters of practice and procedure, which have been said to be convertible terms. ...It is quite clear that a rule of court cannot in terms alter the period of time laid down by a statute within which an action must be brought; but it seems to me to be equally clear that the circumstances in which a litigant may amend his existing proceedings, for example by addition or substitution of defendants, are essentially a matter of practice and procedure. N or does it appear to me that the Order made conflicts with the law contained in the statute of limitations, notwithstanding that, if the amendment had been refused, a defence would have been available to the Irish company under that statute in a different action. It was argued that before the amendment, the Irish company had a sure shield under the statute and the amendment removed the shield; but its sure shield under the statute was one which was available to it in another action should one be brought out of time. Its shield in the present proceedings was not the statute, but the fact that it was not yet a defendant in them. That shield could be taken away by the procedural power of permitting amendment of these proceedings. For these reasons, which appear to me preferable to those based on the conception of statutes of limitation as procedural in character for the purposes of private international law, I do not consider R.S.C. Ord. 20, r. 5 (2) and (3) to be ultra vires "

There are other authorities which seem to further confuse the rhetoric on the issue.

I do not propose to deal with them

MY OPINION:

It is my considered opinion, that because of the simplicity and unambiguity in the language of the rule, the best approach to the question is to give the rule a simple, literal, but purposive interpretation. The Court should seek out the purpose of the rule and then approach its interpretation based on that purpose. The application of the rule is discretionary and the Court should apply that discretion

liberally and with balance. Adopting this purposive approach, it is my view that before the Court will grant the required leave to amend, it must be satisfied that (1) the mistake sought to be corrected was a genuine mistake (2) the mistake was not misleading nor such as to cause any reasonable doubt as to the identity of the person intended to be sued and (3) that it is just to make the amendment. I have already given my conclusions on points (1) and (2). The resolution of the limitation question relates to point (3) which I will now address.

The injustice, if the amendment is granted, as suggested by Dr. Alexis, was the deprivation of Moving Target Ltd. of his defence under the Limitation Acts had a fresh suit been brought. The cases decided before **O 20 R 5** came into being, (already mentioned) seem to agree with this suggestion of Dr. Alexis. Indeed, even in the Privy Council's decision of **Yew Bon Tew in 1982**, there seems to be some support for this suggestion of Dr. Alexis. **Lord Brightman** at p 839 said this:

> "The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witness which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence. "

In my opinion however, when the rule makers contemplated **O 20 R 5**, they must have felt that there was injustice rather than justice in that old law. Hence the

need for the new rule. I do not disagree with them. **As Denning M R** said in **Mitchell,** at p 686.

> " In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remain defective. The court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the court. It is a matter of practice and procedure. As such it can be altered by the rule committee under s. 99 (1) (a) of the Act of 1925. That is what has been done by R.S.C., Ord. 20, r. 5 (2), (3), (4) and (5). Rule 5 (3) has removed the injustice caused by the decision in **Davies -v- Elsby Brothers Ltd. (8).** Rule 5 (4) has removed the injustice caused by **Hilton -v- Sutton Steam Laundry (9).** Rule 5 (5) has removed the injustice caused by such cases as **Marshall -v- London Passenger Transport Board (10) and Batting -v- London Passenger Transport Board (11)**.
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> In my opinion, therefore, the rule was within the powers of the rule committee, and the attack on it fails. It is a most beneficial provision which enables the courts to amend proceedings whenever the justice of the case so requires. The amendment relates back to the date of the issue of the writ. "

I gratefully adopt this opinion. The ratio behind the rule is the requirement for justice in the case.

It is my view that the accrued entitlement on the part of a defendant under a limitation act, is a right born only when the limitation period had expired and no suit had been brought before that expiration. It is a right of a defendant with respect to future institution of proceedings after the relevant period of limitation had expired. It is only then that a defendant should assume that he was no longer at risk from a stale claim and that his potential liability had disappeared. However, once the suit is brought within the prescribed time and even though he is not named in the suit, a defendant must assume that the risk remained.

I accept as a correct statement of the law that a rule of Court cannot in terms alter the period of time laid down by a statute within which an action must be brought. I also accept that the circumstances in which a litigant may amend his existing proceedings are essentially a matter of practice or procedure. I share the view of **Lord Russell** in **Mitchell** that the powers given in **0 20 R 5** do not conflict with the law contained in the Statute of Limitations, notwithstanding that, if the amendment had been refused, a defence would have been available to the first named appellant under the Limitation Act, in a different action.

This "vested right" as the old law described it or "right" as suggested by the Privy Council, is not in my opinion an automatic bar to the amendment being granted. But, it surely is a matter for the consideration of the Court in the exercise of its judicial discretion on such an application. However, the right to this benefit is only relevant for consideration if it is unarguable and not merely reasonably arguable that such a right in fact existed at the time the application is being considered. **(See Leicester Wholesales Fruit Market Ltd -v- Grundy and others (1990) 1 All ER 442.**

In my judgment, **O 20 R 5** is legally powerful enough, if a court finds the other requirements therein satisfied, to join a party to proceedings that are filed within the prescribed time, even after the limitation period may have expired, simply because the suit was filed within the prescribed time.

The instant action was brought within the prescribed time. The shield that the first named appellant seeks to use to protect himself could only be a “sure shield, " if the action was another action brought outside the limitation period. But this action having been brought within the prescribed time, it is my opinion that this "shield, " if in fact it existed, was not the sure shield that the law contemplated, and

could, and should in this case, be taken away by the procedural power of permitting the amendment of the proceedings, especially having regard to my findings above on the other discretionary aspects of the rule.

In any event, having agreed with **St Paul J** that the amendment granted was merely to correct a name, I am of the view that in the circumstances of this case , it is reasonably arguable, **prima facie** maybe with some considerable merit, whether the so called "sure shield" provided by the Limitation Act was in fact available to this appellant. The incident in this case was no more than a misnomer of the name of the owner and publisher of the newspaper the first defendant in the suit, which was brought within the prescribed time. It is therefore debatable whether or not there was any accrued entitlement on the part of the first defendant to this right when the first named appellant was at all material times **de facto and de jure**, the first defendant in the suit.

Before I conclude I should mention that in **Hughes -v- Hughes, Civil Appeal No 8 of 1996 Anguilla,** this Court on June 1, 1998 expressed an opinion of the law on this subject. That opinion was not totally correct as it was based on the old law before the **Order** came into existence. At the hearing of that appeal, the provisions of **Order 20 R 5** and the authorities referred to herein were not brought to our attention or addressed. Fortunately, for justice, the result of the appeal was not based on that opinion. The opinion was therefore **obiter** and should not be followed.

CONCLUSION

I would therefore finally conclude that in the instant matter, all the criteria of **R.S.C. O 20 R 5** have been met. Accordingly I hold, that the order made by the

Trial Judge was a just and correct order and was permissible under **0 20 R 5 (3):** Not to have made such an order would have placed a blemish on the law, the very blemish that **020 R (5)** was created to erase. The appeal is dismissed with costs to the respondent to be taxed if not agreed.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal (Ag.)