IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2005HCV0229

BETWEEN	**SHAWNA WILLIAMS**	**CLAIMANT**
AND	**GARRY GILZENE**	**FIRST DEFENDANT**
AND	**RODERICK DENTON REID**	**SECOND DEFENDANT**
AND	**MORRIS HILL**	**THIRD DEFENDANT**
AND	**GLENVILLE OSBOURNE**	**FOURTH DEFENDANT**

Miss Phyllis Dyer for the claimant

Miss. Charmaine Patterson instructed by Charmaine Patterson and Associates for the third defendant

Heard: June 16, 2011 & June 14, 2012

JURISDICTION — APPLICATION FOR SET ASIDE ORDER ADDITION OF DEFENDANT AFTER THE EXPIRY OF THE PERIOD OF LIMITATION

SIMMONS, J.

[1] The claim in this matter concerns a motor vehicle accident which occurred on the 27th November 2003. On the 4th day of August 2005 the claimant who was a passenger in motor vehicle licensed 9897 DZ, filed an action against the first and second defendants. A default judgment entered against them on the 6th November 2007 was set aside on the 5th November 2009 and a defence filed on their behalf. On the 16th April 2010 a Notice of Application was filed seeking the court's permission to join the third and fourth defendants, the owner and driver of

motor vehicle registration number TT4417. The application was heard on the 19th April 2010, the date set for the Case Management Conference. The third defendant indicates that he was never served with the said application.

[2] On the 19th April 2010, E. Brown, J (Ag.) as he then was, granted the orders sought by the claimant. The amended pleadings were to be served on the new parties within sixty (60) days of the date of the order.

[3] The third defendant filed a notice of application in which he seeks the following orders:-

i. That the order granted at case management conference on the 19th day of April 2010, that the owner and driver of the Trailer registration no. TT4417/101870 – owner – Morris Hill of Iverness, Browns Town P.O. St. Ann – driver Glenville A. Osbourne of 86 ½ Gyles Avenue, Linstead, St. Catherine be joined as defendants to this action be set aside.

ii. The claimant's statement of case as it relates to the 3rd and 4th defendants be struck out as it is an abuse of the process of the court and is likely to obstruct the just disposal of the proceedings.

iii. The claimant's Amended Claim Form and Particulars of Claim both filed on the 30th day of April 2010 be struck out as the application to amend same was done after the expiry of the period of limitation.

Jurisdiction

[4] The third defendant has indicated that he was served with the April 2010 Application and the Order on Case Management Conference in December 2010 and as such was never in a position to oppose same. He states that at the time when he was added as a defendant any action against him was statute barred and that he will be prejudiced if the case is allowed to continue against him as his

only witness, the driver died in January 2004. The claim against that individual who was added as the fourth defendant in this suit was discontinued in June 2011. He also indicated that he would have had no reason to obtain any information pertaining to the accident from Mr. Osbourne as no action had been commenced against him.

[5] Rule 11.18 of the ***Civil Procedure Rules 2002 (C.P.R.)*** gives the court the jurisdiction to set aside an order in particular circumstances. The rule states:

> *"(1) A party who was not present when an order was made may apply to set aside that order.*
>
> *(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*
>
> *(3) The application to set aside the order must be supported by evidence on affidavit showing-*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other order might have been made."*

The general rule as stated in rule 11.11 is that a notice of application is to be served at least seven (7) days before the date of hearing. However, the application which is the subject of this matter was made without notice. In these circumstances the affected party has fourteen days (14) in which to apply for any order made to be set aside.

[6] The third defendant in his affidavit states that he was served with the order in December 2010. However, the affidavit of service indicates that this document was served on the 26th November, 2010. This discrepancy in my view does not affect the matter as the application to set aside the order was not filed until April 14th 2011, almost five months after it was served. There has been no application

to extend the time within which the third defendant is permitted to challenge the said order.

[7] In these circumstances it is my view that the court has no jurisdiction to set aside the order.

[8] I now go on to consider paragraph two of the third defendant's application. Rule ***26.3 (1) (b)*** of the ***C.P.R.*** is relevant to the determination of this issue. It states:-

> *"(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;"*

In addition to the above rule, the court has an inherent jurisdiction to strike out pleadings which are shown to be an abuse of process. This power is a discretionary one and the relevant case law indicates that it is only to be exercised in exceptional circumstances. The term abuse of process was described by Lord Diplock in ***Hunter v. Chief Constable of the West Midlands Police and others*** (1982) A.C. 529 as the *"misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".* His lordship further stated: *"…the circumstances in which abuse of process can arise are very varied; It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power".*

[9] In ***Ronex Properties Ltd. v. John Laing Construction Ltd. and others*** (1983) Q.B.D. 398, an application to strike out a third party notice on the basis that there was no reasonable cause of action as it was time barred was refused. On appeal, it was held that such an order could only be made where *"…it was manifest that there was an answer immediately destructive of the claim; that since a defence under the Limitation Acts barred the remedy and not the claim and that defence had to be pleaded, the application …was misconceived".* However, the court was of the view that a defendant who has a defence under the Limitation Act had the option of either pleading that defence or applying to strike out the claim on the basis that it is frivolous, vexatious and an abuse of the process of the court.

[10] The amended claim in this matter, states that the accident which caused the claimant's injury was either due to the second defendant's negligence and/or that of the fourth defendant who is said to have collided with the vehicle driven by the said claimant. This amendment seems to have had its genesis in the defence that was filed on behalf of the first and second defendants who lay the blame for the accident squarely at the driver of the trailer, the fourth defendant.

[11] The third defendant in his affidavit states that at the time when the application was made the fourth defendant who was the driver of his vehicle had died. Mr. Hill gives the approximate date of death as the 22nd January 2004.

[12] Miss Patterson submitted that the limitation period in this matter had already passed when the third defendant was made a party to these proceedings and as such, the amended statement of case in so far as it relates to him ought to be struck out. She indicated that the presence of the third defendant's vehicle at the scene of the accident was not new information and that a failure to bring the claim against the third defendant within the limitation period was an affront to the court. Further, it was indicated that the third defendant would not be in a position to defend the claim on its merits as his only witness is dead. It was also submitted that the expiry of the limitation period was a complete defence to the claim.

[13] Counsel also argued that a claim which was commenced after the expiry of the limitation period could be struck out on the basis that it is an abuse of the process of the court. She referred to the case of ***Letang v. Cooper*** [1964] 2 All E.R. 929 as an authority for the proposition that a claim could not be commenced after the expiration of the limitation period.

[14] Miss Dyer has maintained that the said defendant was properly added as a party in accordance with ***rules 19.4 (2)*** and ***(3) (c)*** of the ***C.P.R.*** This rule which deals with the addition of parties after the expiry of the limitation period state:-

> *"(2) The court may add or substitute a party only if –*
>
> *(a) the relevant limitation period was current when the proceedings started; and*
>
> *(b) the addition or substitution is necessary.*
>
> *(3) The addition or substitution of a party is necessary only if the court is satisfied that –*
>
> *(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party.;*
>
> *(b) the interest or liability of the former party has passed to the new party;*
>
> *(c) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant".*

She indicated that at the time when the application for the joinder was made counsel was new in the matter and it was based on information that was just disclosed. Counsel also urged the court to find that the joinder of the third defendant fell within the provisions of the above rule.

[15] I do not propose to go into the merits of whether or not the third defendant was properly joined as the order has already made and the time for its challenge has passed. The question which now needs to be addressed is whether the proceedings against the third defendant ought to continue.

[16] This issue was considered in ***Liff v. Peasley and another*** [1980] 1 All E.R. 623. In that case, the plaintiff who was a passenger in a car driven by S was injured when it collided with a car driven by P. An action was commenced against P whose insurers repudiated liability. The limitation period expired on the 2nd October 1976 and in June 1977 P filed his defence in which it was alleged that S was either solely or partly responsible for the accident. On the 5th October 1978 an order was made that S be joined as the second defendant and permission given for the statement of claim to be amended. S filed a defence in which he pleaded that the action against him was time-barred and subsequently applied for the claim against him to be struck out. In the alternative, he asked for an order that he should cease to be a party on the basis that he had been improperly joined. His application was dismissed and he appealed. On appeal, it was held that he had been properly joined due to the fact that at that time it was not known whether he would plead the limitation defence. The court also held that although he had entered an unconditional appearance to the suit, he could object to the joinder on the basis that it took away *"an accrued right of defence"* under the *Limitation Act of 1939*. The court also dealt with the matter on the basis that the entry of the unconditional appearance did not preclude S from objecting to the joinder and in those circumstances the *Limitation Act* could still be pleaded. It is to be noted that the action against S was deemed to have been commenced from the date when the writ was amended and since the action was time-barred at that time the court stated that there was no useful purpose in allowing the joinder.

[17] Stephenson, L.J. in his judgment, also referred to the case of ***Mabro v. Eagle Star and British Dominions Co. Ltd.*** [1932] All E.R. 411 at 412 where Scrutton, L.J. said: *"in my experience the Court has always refused to allow a*

party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence".

[18] Prior to the ***C.P.R.*** the misjoinder and nonjoinder of parties was governed by rule 100 of the Judicature (Civil Procedure Code) Law which is similar to order 15, rule 6 of the English Rules at that time. That rule did not speak to the issue of joinder after the expiry of the limitation period. In ***Lucy v. Henley's Telegraph Works Co*** [1970] 1 Q.B. 393, the court refused to amend the pleadings to permit the joinder of another defendant on the basis that it would deprive that defendant of a defence under the *Limitation Act* of 1963. The court was of the view that it could not be inferred that the provisions which deal with the amendment of pleadings gave the court a discretion to add a defendant where the limitation period affecting the proposed defendant had expired. Megaw, L.J. stated clearly that *"provisions as to limitation of actions are for the benefit of defendants".*

[19] ***Order 15, rule 6*** of the current English Rules bears some similarity to Rule ***19.4*** of the ***C.P.R.*** However, Jamaica is still operating on the basis of the *Limitation of Actions Act* of 1881. In ***Brown and another v. Jamaica National Building Society*** Supreme Court Civil Appeal No. 29/09, delivered March 4, 2010 Harrison, JA said: *"The law governing the limitation of actions in Jamaica is not, in our view, in an entirely satisfactory state."* The appellant sought to rely on section 32 (1) of the UK Limitation Act 1980 as authority for the extension of the limitation period in that suit. His lordship traced the development of this area of the law and commented that there was no equivalent section in Jamaican law.

[20] There have been several amendments to the UK statute. Of particular note are ***sections 33*** and ***35***. The latter section permits the joinder of parties after the expiry of any relevant period of limitation in certain circumstances. However, the exercise of the court's discretion is subject to the overriding objective *"to deal with cases justly"*. As a consequence the court would of necessity have to consider the prejudice which may be suffered by either party.

[21] The case of ***Martin v. Kaisary*** [2005] All E.R. 144 illustrates the discretionary nature of those sections of the English Act. The claimant in that case brought an action for personal injuries against the defendant who was his surgeon. Whilst in hospital he was attended to by nurses who were employed by an NHS Trust for whose actions the pleadings stated the defendant was vicariously liable. The defendant denied any responsibility for the nursing staff. The claimant sought to join the NHS Trust by amending the Particulars of Claim after the expiration of the limitation period on the basis that the claim against the First Defendant could not properly be carried out without adding the Trust. The Judge considered whether the action should be allowed to proceed under ***section 35*** of the ***Limitation Act 1980*** which gave the court discretion to extend the limitation period for bringing an action in certain circumstances. The application was refused. The appeal was dismissed on the basis that the addition of the Trust was not necessary for the determination of the matter.

[22] In ***The Lu Shan*** [1991] 2 Lloyd's Rep. 386 the court ruled that although there was a discretion to extend the limitation period it would not allow a party to be added as a plaintiff after its expiry. In that matter the court found that the decision not to include that party was a deliberate one.

[23] I have had the benefit of Counsels' submissions in this matter and have been referred to numerous cases. Those submissions for the most part address the issue of whether the court ought to have allowed the joinder and are focused on the criteria set out in ***rule 19.4*** which guide the court in the exercise its discretion. In this case the horse has already gone through the gate.

[24] The issue at this juncture is whether the joinder ought to be allowed to stand. Its resolution is not in my view, dependent on whether the claimant has satisfied the criteria in ***rule 19.4*** of the ***C.P.R***. The question which needs to be answered is whether the statutory basis exists for the court to allow the action to continue against the third defendant. Having perused the ***Limitation of Actions Act*** of 1881, I am of the view that there is no provision which is similar to the

1980 UK Act which supports the judicial extension of the limitation periods prescribed by that legislation.

[25] In the circumstances, I agree with counsel for the third defendant that the joinder amounts to an abuse of the process of the court. The proceedings against him should not be allowed to continue.

[26] The substance of the relief sought in paragraph three of the Notice of Application appears to be a challenge to the orders made at the case management conference. I have already ruled that the application is out of time.

[27] It is my decision that the claimant's statement of case as it relates to the third defendant be struck out as it is an abuse of the process of the court and is likely to obstruct the just disposal of the proceedings. Costs of this application and costs thrown away are awarded to the third defendant.