

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**CLAIM NO: SLUHCV2017/0469
BETWEEN:**

**[1] Phillip Eric Paston Bacon
[2] Stephanie Gilbert qua
Administrators of the Estate of Quinton Garrathy
Claimants**

and

**[1] Sebastian King
[2] Dr. Stephen King
[3] Rumelia King
Defendants**

Before: Ms. Agnes Actie Master

Appearances: Mr. Horace Fraser for the claimants
Mr. Alberton Richelieu for the defendants

2018: June 4
September 5

JUDGMENT

[1] **ACTIE M:** Prescription under the Civil Code of St Lucia can only be interrupted if an action is filed and served before the prescribed period. The claimants, who failed to serve the first defendant within the prescription period, apply for leave to remove the first defendant as a party and to amend the statement of claim. The defendants oppose the application to amend the statement of claim. For the following reasons the application to amend the statement of claim is allowed with costs to the defendants.

Background

- [2] On 3rd August 2014, Quinton Garrathy met his death in an accident involving a motor car driven by Sebastian King on the Gros Islet Highway in the vicinity of the Rodney Bay Marina. The motor car was registered in the names of the 2nd and 3rd defendants.
- [3] On 27th July 2017, the claimants Qua Administrators, filed a claim form with statement of claim for damages against the first defendant, Sebastian King, as driver and the 2nd and 3rd defendants as owners. The claimants pleaded that the first defendant drove the vehicle with the authority of the 2nd and 3rd defendants, and as their agent. The claimants further pleaded that the accident was caused by the negligent driving of the first defendant who was an inexperienced driver by virtue of a provisional licence. The claimants also pleaded the concept of Res Ipsa Loquitor in relation to the cause of the accident.
- [4] The 2nd and 3rd defendants filed a defence denying that the first defendant was acting as their agent and pleaded particulars as to how the accident happened. The claim was not served on the first defendant within the prescription period.

The claimants' application to amend the statement of claim

- [5] On 30th January 2018, the claimants filed an application pursuant to CPR 20.1 for leave to amend the statement of claim to remove the "first defendant" as a party and deleting any reference made to the "first defendant" to read "Sebastian King".
- [6] The defendants challenge the application on three grounds namely: (1) the application is an attempt to amend the claim beyond the prescription period (2) The cause of action alleged and relied on in order to determine the liability of the 2nd and 3rd defendants has expired and (3) the amendment is not a procedural misstep but will cause great injustice to the remaining defendants by requiring them to answer to a matter which there is no case at all.

- [7] The main issue to be determined is whether the removal of the first defendant as a party to the claim bars the continuation of the proceedings against the owners.

Whether the removal of Sebastian King acts as a bar to proceed against the two remaining defendants

- [8] Counsel for the defendants contends that in order for the 2nd and 3rd defendants to be held vicariously liable there must be a valid subsisting cause of action against Sebastian King who was the driver at the time of the accident.
- [9] In response, counsel for the claimants contends that the cause of action against the three defendants is joint and several. Counsel avers that the cause of action as against the owners is based on permission given to Sebastian King or in agency. Counsel contends that the fact that the claim against Sebastian King is prescribed does not alter the legal position as the factual matters attendant to the cause of action are not prescribed.

Analysis

- [10] It is settled law under the **Civil Code of Saint Lucia** that prescription can only be interrupted by the filing and serving of a claim within the limitation period. This principle was pronounced by Gordon JA (Ag) in the seminal Court of Appeal decision in **David Sweetnam v The Government of Saint Lucia**¹, and further cited with approval in **Dorina Joseph et al v Nora St Louis**², where he states:-
- “Interruption of the period of prescription only takes place if an action is filed and served before the prescribed period under the Civil Code, if service of process takes place after the relevant period of prescription has elapsed, it matters not at all when the suit was filed”
- [11] It is axiomatic that the claim against the first defendant is extinguished for failure of service. **CPR 2000 Rule 19.3 (1)** allows the court to remove a party with or without an application.

¹ Civil Appeal No. 42 of 2005 delivered on 28th October 2005.

² HCVAP2008/025 delivered on 6th July 2009.

- [12] Counsel for the defendants contends that since there is no cause of action against Sebastian King, the driver, then all actions arising out of the accident and/or negligence are prescribed. In support, counsel relies on **Article 2129 of the Civil Code** and its application in the case of **Michelle Stephenson et al v Lambert James-Soomer**³ citing with approval the decision of Byron JA in the Court of Appeal decision in the case of **Walcott v Serieux**⁴.
- [13] **Article 2129 of the Civil Code** provides:-
- “In all the cases mentioned in articles 2111, 2121 to 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.”
- [14] The Court of Appeal in **Walcott v Serieux** applied **Article 2129** to defeat an application to amend a claim made after the limitation period. The appellant, **Walcott**, brought an action for damages done to his vehicle as a result of the respondent's negligent driving. At trial, **Walcott** gave evidence that the vehicle belonged to a company of which he was a director. In view of the evidence, it was discovered that the wrong plaintiff was before the court. **Walcott** sought leave to amend the claim to substitute the company as the plaintiff. The application was refused as the leave to amend and for substitution of the company as plaintiff was made outside the limitation period. On appeal, Byron JA, as he then was, held that under **Article 2129 of the Civil Code**, both the rights as well as the remedy are extinguished; as long as the evidence in a claim discloses that the period of limitation has expired, the judge has no discretion in the matter. The Court held that any amendment would have meant that the substituted plaintiff would have been instituting proceedings out of time.
- [15] I am of the view that the case of **Walcott v Serieux** is distinguishable from the issue at bar. The application before this court is for the removal of the driver as a party to the proceedings, and to remove all reference to him as a party. The

³³ SLUHCV2003/0138

⁴ SLU Civil Appeal No 2 of 1975

application does not seek to add or substitute a party in place of the driver to bring the issue within the realm of the principle enunciated in the **Walcott's** case. There would therefore be no instituting of new proceedings; the existing proceedings would continue against the second and third defendants while removing the first defendant as a party.

[16] The issue as to whether the cause of action survives against the owners of the vehicle requires an analysis of the provisions in the **Civil Code** in relation to the tort of agency.

[17] The English concept of agency in torts and contracts applies to St. Lucia⁵. **Article 1(15) of the Civil Code** defines the terms “Delict” and “Quasi Delicts” as injurious act or incident which, in the absence of any contract gives rise to an obligation towards the injured person on the part of another person. The act or incident is termed “delict” when there is an obligation and “quasi delict” when there is not, injurious intention or culpable negligence on the part of the debtor’.

[18] Gordon JA in the Court of Appeal decision in **Dorina Joseph et al v Nora St Loius et al**⁶ states:-

“the difference as between the common law concept of tort and the civil law concept of delict/quasi delict is that whereas the common law concept gives right to obligations in “rem”. The civil law gives rise to obligations in “personam” being dependent on the finding of fact by a trial court.”

[19] **Article 1037 of the Civil Code** provides that “the obligations arising from the common delict or quasi delict of two or more persons is joint and several”. Under the principle of agency, the principal is liable for damages caused by the fault of the agent. For the wrong of an agent acting within the scope of his principal’s authority, the claimant has a right of action against either the principal or the agent or against both.

⁵ Article 917 A, 1608 A.

⁶ SLUHCVAP 2008/025 delivered on July 6, 2009.

[20] There is a presumption of agency when a claimant seeks to recover damages from the owner of a vehicle in respect of the negligent driving by a person other than the owner. The inference of agency was in issue in **Hewitt v. Bonvin**⁷, where a motor car driven by the son of Mr. Bonvin was involved in an accident causing the death of a passenger. The administratrix of the deceased sued Mr. Bonvin senior, for damages. Du Parc LJ thought that the better way of putting the respondent's case was on the basis of agency, and said:

“The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty”.

[21] The instant claim as framed is based in negligence on the driver, Sebastian King and on the concept and presumption of agency against the owners of the vehicle, respectively. The claim was timely filed and served against the 2nd and 3rd defendants. The cause of action against the owners accrued within the limitation period. The 2nd and 3rd defendants filed a defence and submitted to the court's jurisdiction. The defendants denied that Sebastian King was acting as their agent at the time of the accident and pleaded their version of facts as to the manner in which the accident occurred.

[22] Whether Sebastian king was acting as defendants' agent is a matter to be determined at trial. The Privy Council in **Rambarran v Gurrucharran**⁸ held that ultimately the question of agency is one of fact and the burden of proof of agency lies on the party who alleges it⁹.

[23] At the time of issuing the statement of claim, Sebastian king was a party and was described as a defendant. The claimants are seeking leave to amend the claim to

⁷ [1940] 1 KB 188

⁸ [1970] 1 All ER 749

⁹ See also Hewitt v Bonvin [1940] 1 KB 188.

remove Sebastian King as a party and to correct any reference made to him to read "Sebastian King" as the driver instead of as "the first defendant".

[24] There is no need to name the agent as a party to a claim as long as the claim naming the principal had been timely filed. Therefore, Sebastian King need not be named as a party to maintain a cause of action against the owners of the vehicle. I am of the view that the cause of action based on the principle of agency is still alive against the owners. The removal of Sebastian King does not extinguish the cause of action against the defendants as owners, who were served within the prescription period.

[25] The proposed amendment is such that it takes effect from the date of the original claim and what stood before in the original statement of claim, no longer defines the issues. The proposed amendments will have the effect of amending the original claim such that Sebastian King will no longer be named as a party to the claim but simply as the driver and agent of the defendants to support the pleadings.

[26] Rule 20.1(2) lists the factors which the court must have regard to when considering an application to amend a statement of case namely: (a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make; (b) the prejudice to the applicant if the application were refused; (c) the prejudice to the other parties if the change were permitted; (d) whether any prejudice to any other party can be compensated by the payment of costs.

[27] I have considered all the relevant factors. The prejudice to the claimants will greatly outweigh the prejudice to the defendants, if the application is refused. The defendants have already filed a defence which may only need slight amendment. The matter is still at case management stage and it would be in keeping with the overriding objective if the pleadings were amended to allow the matter to proceed to trial. An award of costs can sufficiently compensate the defendants.

[28] In the circumstances, I will grant the claimants' application to amend the statement of claim with costs to the defendants.

ORDER

[29] In summary, it is ordered and directed as follows:

- (1) The application to remove the first defendant as a party and for leave to file an amended statement of claim is granted.
- (2) The claimants shall file and serve the amended statement of claim within fourteen (14) days of today's date.
- (3) The defendants are granted leave to file an amended defence, if necessary, within fourteen (14) days of service by the claimants.
- (4) The claimants may file a reply, if necessary, in accordance with CPR 10.9.
- (5) Thereafter the matter shall be listed for Case Management Conference.
- (6) Costs to the defendants in the sum of \$500.00 to be paid within fourteen (14) days of today's date, unless otherwise agreed.

Agnes Actie
Master, High Court

By the Court

Registrar