

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2016/CLE/gen/01355

BETWEEN

BLUE PLANET GROUP LIMITED

First Plaintiff

AND

YELLOW ELDER COMPANY (BAHAMAS) LTD

Second Plaintiff

AND

WILLIAM DOWNIE

Defendant

AND BETWEEN

WILLIAM DOWNIE

Plaintiff to Counterclaim

AND

BLUE PLANET GROUP LIMITED

YELLOW ELDER (BAHAMAS) LTD

Defendants to Counterclaim

Before Hon. Mr. Justice Ian R. Winder

Appearances: Tara Archer-Glasgow with Audley Hanna Jr for the Plaintiff

Metta MacMillan-Hughes with Chizelle Cargill and McFalloughn
Bowleg for the Defendant

JUDGMENT

WINDER J

This is the defendant's (Downie) application that the addition of Yellow Elder Company (Bahamas) Limited (Yellow Elder) as a plaintiff in the action not relate back, but only take effect from the date of the amendment of the Writ.

1. A brief chronology of the filings in this action are as follows:

- 16 Sep 16 Writ of Summons by Blue Planet seeking claims for breach of contract and for damages arising out of a contract of employment.
- 19 Dec 16 Notice of Appearance by Downie.
- 29 Dec 16 Statement of Claim filed by Blue Planet.
- 30 Jan 17 Summons by Downie to strike out Blue Planet and alternatively the substitution of Yellow Elder as the Plaintiff
- 14 Mar 17 Defence and Counterclaim filed on behalf of Downie suing Blue Planet and Yellow Elder.
- 5 May 17 Amended Defence and Counterclaim filed on behalf of Downie removing Blue Planet as a Defendant to Counterclaim.
- 16 May 17 Summons to strike out the Amended Defence and Counterclaim.
- 15 Dec 17 Summons by Downie to amend Amended Defence and Counterclaim

- 12 Mar 18 Summons by Blue Planet and Yellow Elder (Bahamas) Limited seeking to join Yellow Elder and amend the Statement of Claim.
- 25 Feb 19 Hearing on the outstanding applications (including the application to join Yellow Elder) concluded.
- 18 Apr 19 Written Ruling granting, inter alia, leave to add Yellow Elder as a plaintiff to the action.
- 02 May 19 Amended Statement of Claim, which includes Yellow Elder as a plaintiff to the action is filed.
- 17 Feb 20 Summons by Downie applying for a special order that the amendment of the claim to include Yellow Elder ought not to relate back.
- 4 Mar 20 Application to amend Writ of Summons

2. As indicated in the above chronology, I granted leave, following a contested hearing, to join Yellow Elder as a plaintiff in the action. Paragraphs 7-10 of that written ruling provided as follows:-

7. Order 20 rule 5 of the Rules of the Supreme Court, provides:
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.
8. The object of the amendment of pleadings is to enable the parties to alter their documents so as to ensure that litigation between them is not tied down to the original facts, but on the basis of the true state of the facts, or the true relief or remedy. The Court of Appeal in the case of Bahamas Telecommunication Company Limited v Island Bell Limited SCCivApp No. 188 of 2014 provides a useful discussion on the law relative to amendments. Crane-Scott JA, delivering the decision of the Court stated:
[22.] The Notes in the White Book (Supreme Court Practice 1993) which explain the operation of Order 20 rule 5 suggest that the aforementioned rule ought to be read together with rule 8, which states: "8. - (1) for the purpose of determining the real controversy

between the parties to any proceedings or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the 9 proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. (2)..."

[23.] Bowen L.J in *Cropper v Smith* (1883) 26 Ch D. 700 at 710- 711 stated the general principles for granting leave to amend. He said: "It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters of controversy, and I do not regard such amendment as a matter of favour or grace...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

...

[34.] As previously noted, such amendments should only be allowed if they can be done without injustice. In determining whether there is injustice, the court must consider the lateness of the application; the sufficiency of the reasons for the late application; whether a fair trial and the determination of the issues would be compromised by the granting of leave; and whether costs would compensate.

9. These are applications to amend and ordinarily, unless issues of limitation arise, they are not ordinarily contested and the issue simply one of costs associated with consequential amendments. But everything in this matter is always hotly contested. Downie alleges, inter alia, that the claims being raised do not disclose reasonable causes of action citing the rule in *Foss v Harbottle*. He argues that Yellow Elder cannot have any cause of action with respect to money it is not alleged it paid to Downie as it has not been deprived of any property and it has not suffered any loss or damage in the circumstances. They also allege that there is no basis upon which there can be a proper claim by both of the companies on the pleadings. I disagree, Downie's complaints, in my view, all call for an assessment of the available evidence which is a matter for trial rather an application to amend. The claims by Blue Planet and Yellow Elder all appear to be properly capable of being made and subsisting as framed by Blue Planet.

10. Notwithstanding the claim was filed since September 2016, and as noted by Downie in his submission in support of his own application to amend, "the parties are at a very early stage of these proceedings". In fact, the pleadings are yet to be formally closed and as such, I am satisfied that

no injustice would be caused to any party should the amendments be allowed. (emphasis added)

3. During the course of the several hearings concerning the addition of Yellow Elder as a plaintiff to the action, Downie never raised any issue as to the denial of a potential limitation defence. Paragraph 9 of the written ruling noted, indirectly, that issues of limitation were not raised by anyone. It was only at the hearing, upon the delivery of the written ruling, that counsel for Downie, for the first time raised the issue of whether the amendment ought to relate back. It was indicated by Counsel that a formal application would be made.
4. Despite the fact that a date had been secured by Downie, it is not until 17 February 2020 that the application is formally made.
5. Downie says at paragraphs 7-9 of his written submissions as follows:
 7. There are well established principles applied on applications under **RSC Order 15 r 6** relative to the addition of a party and, as stated in the notes to **RSC 1999 paragraph 15/6/3** one is that leave to add or substitute a plaintiff will not be granted where to do so would be to prevent the defendant from relying on a limitation defence. See **Mabro v Eagle Star & British Dominions Insurance Co [1932] 1 KB 488, CA** and **Ketteman v Hansel Properties Ltd. [1988] 1 All ER 38, HL.**
 8. However, in circumstances where there is an arguable question whether or not the claim is statute barred which the Court does not feel is possible or appropriate for determination on an interlocutory application, the order giving leave to add the party, will be made on special terms, namely that **the addition of the party as a Plaintiff shall not be deemed to relate back to the date of the issuance of the Writ in the action, but shall take effect from the date of amendment of the writ only.** See **Liff v Peasley (supra)** per Brandon LJ at page 642 paras e – f and page 643 paras a – d.
 9. Once the special order is made, William Downie will be able to plead and rely on the statutory limitation defences that he has to the claims by Yellow Elder. In the absence of such an Order he is, and has been, unable to do so. The terms of the Order sought is as follows:

“that the addition of Yellow Elder Company (Bahamas) Ltd as a Plaintiff to the action shall not relate back but shall take effect from the date of the amendment of the writ only”

6. Downie asserts that a substantial number of the claims, save perhaps for the fraud, would have generally expired after around July and November 2018. Save for a few claims relative to travel expenses these claims would have expired after Yellow Elder would have made application to be joined as a party in March 2018.
7. Notwithstanding the application to join Yellow Elder and to amend the Statement of Claim, there was no specific application to amend the Writ of Summons. In my view, implicit in the grant of leave to join Yellow Elder as a party must include leave to amend the Writ of Summons. It is not surprising therefore that all parties, including Downie have, since the grant of leave to join Yellow Elder, included Yellow Elder in the heading of the action as the Second Plaintiff. In any event, it seems that having regard, to the complaint raised by Downie, Yellow Elder has applied to formally amend its Writ of Summons.
8. Yellow Elder says:
 - (1.) It is accepted that, in the usual course, where a party is added to an action (as either a plaintiff or as a defendant) or where a new cause of action is added to a pleading a defendant should not be deprived of the benefit of a limitation defence. As such, in most cases, the addition of a party or the addition of a new claim will be disallowed upon the application of a defendant (although not otherwise) if it can be established that the defendant has an accrued right to a limitation defence.
 - (2.) It is also accepted that, in most cases, where there is an amendment to a pleading it may be framed in terms whereby the amendment is deemed to not relate back to the filing of the action, but rather, to the date of the amendment so as to not deprive a defendant of the right to plead limitation.
 - (3.) Notwithstanding points 1 and 2 above, however, it is the Plaintiffs' position that there are certain general, specific and procedural exceptions to the doctrine which prohibits the operation of relating back.
 - (4.) Procedurally, it is submitted that an application with respect to relating back should be made either: (i) during the course of the *inter partes* joinder application; or (ii) where a joinder or amendment has been made *ex parte*, then an application to strike out the amendment or joinder should be made

as soon as reasonably practical after the defendant is served with the claim. However, where a defendant participates in a joinder and/or amendment application any ruling rendered presumes a relating back and should more appropriately be appealed.

- (5.) Also, as a practical matter, even if it is determined that the joinder of Yellow Elder should not relate back to the commencement of the action, having regard to the Limitation Act 1995 (the "LA") and the relevant practice, as Yellow Elder was made a party to a counterclaim, but for the convoluted steps taken by the Defendant, it would certainly have been at liberty to enter a counterclaim to the Defendant's Re-Amended Defence and Counterclaim. In such a case, Yellow Elder's counterclaim would have related back to the commencement of the original action in any event.
- (6.) Additionally, the form of order sought by the Defendant is not proportional in context. Leave to amend and to join having been granted on 18th April, 2019 (which is the date that the Plaintiffs would argue should be relevant in any event), the only claims which could be statute barred in the usual course would be those which predate 18th April, 2013. In any event, as is not disputed in the Defendant's Submissions, the Plaintiffs have raised allegations of fraud which extend the limitation period from the date of knowledge. Upon review of the Amended Statement of Claim, very few claims relate to prior to 18th April, 2013, and virtually all claims being advanced have an underlying basis in fraud.
- (7.) It is respectfully submitted; however, that the need to amend the Writ is, at this juncture and in these circumstances, merely procedural so as to give effect to something that remains to be done pursuant to an Order of this Honourable Court granting permission for the amendments to be made. At this stage, numerous steps have been taken post leave being granted to amend such as the filing of the Amended Statement of Claim, the filing of the Re-Amended Defence and Counterclaim, the filing of the Reply and even the filing of a List of Documents.

There is some merit in the various submissions of Yellow Elder.

9. Having considered the submissions of the parties, I will order that the amendment relate back to the date of the issuance of the Writ in the action. My reasons include but are not limited to the following:
 - a) Despite the protracted and extended period for which the application to join Yellow Elder as a party to the action proceeded, Downie never objected to the amendment on the basis of any limitation or claimed that it would be denied an opportunity to raise a limitation defense. Indeed the vast amounts of what

Downie alleges as the expired period arose during the pendency of Yellow Elder's application.

- b) Downie, notwithstanding he claims that Yellow Elder has been delayed in pursuing the claim, seeks the special order by Summons dated 20 February 2020, almost 2 years after Yellow Elder made its application to be joined.
- c) Had Yellow Elder file a separate action on 18 March 2016, which it was entitled to do, there would be very little, if any, demur by Downie.
- d) Had Downie not opposed the application to amend (which I have ruled since April 2019 they ought not to have) the amendment would have taken place in advance of any perceived limitation issue.
- e) Yellow Elder was permitted to be joined in the claim and make allegations in the Amended Statement of Claim against Downie. Downie has joined issue with those claims in his Amended Defence and Counterclaim.
- f) The interest of justice leans in favor of permitting the amendment to relate back to the date of the issuance of the claim.

10. I order that an Amended Writ of Summons to be filed within 7 days from the date hereof.

11. I make no order as to costs.

Dated the 27th day of July 2020

A handwritten signature in black ink, appearing to read 'I. R. Winder', with a stylized flourish at the end.

Ian R. Winder

Justice