

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

Cause No: 0470/2010

3
4
5 **BETWEEN:**

APRIL FISHER

PLAINTIFF/RESPONDENT



6
7
8
9
10 **AND:**

TELL ALL LIMITED

1ST DEFENDANT

11
12
13
14
15 **AND:**

FIREWORKS LIMITED

2ND DEFENDANT/APPLICANT

16
17
18
19
20
21 **Appearances:**

**Mr. James Kennedy of Samson & McGrath
for the Second Defendant/Applicant**

**Ms. Andrea Dunsby of Turner & Roulstone
for the Plaintiff/ Respondent**

22
23
24
25
26
27 **Before:**

The Hon. Mr. Justice Charles Quin

28 **Heard:**

19th August 2011

29
30 **RULING**

- 31
32
33 1. On the 24th May 2011 the Second Defendant, and Applicant in this matter, issued a
34 summons for an Order that:

35 "1. *The Amendments made under O.20 r.1 of the GCR by the Plaintiff to*
36 *the Writ as amended on March 14th 2011 be struck out as frivolous,*
37 *vexatious and an abuse of the Court pursuant to O.15 r.6(2) and O.18*
38 *r.19(1) of GCR.*

39 2. *The costs of and occasioned by this Application be to the Second*
40 *Defendant, the same to be taxed if not agreed."*

Chronology and Relevant Background

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

2. On the 31st December 2007 the Plaintiff attended a New Year's Eve celebration at Grand Old House, which is the trading name of the First Defendant. During the course of a fireworks display organised and controlled by the Second Defendant, the Plaintiff was struck in the eye by a firework, causing the Plaintiff injuries.

3. On the 24th December 2010 the Plaintiff issued a Writ of Summons against the First Defendant claiming damages for personal injuries, loss and damage as a result of the said fireworks accident.

4. On the 14th March 2011 the Plaintiff filed an Amended Writ of Summons, adding the Second Defendant, and claiming damages for personal injury, loss and damage as a result of the negligence of both the First and the Second Defendants.

5. On the 21st April 2011 the Plaintiff filed her Statement of Claim against the First and Second Defendants.

6. On the 3rd May 2011, the First Defendant filed an acknowledgment of service, indicating that it intended to contest the proceedings.

7. On the 11th May 2011, the Second Defendant filed an acknowledgment of service indicating that it intended to contest the proceedings.

8. On the 19th May 2011 the Second Defendant filed its defence, denying the Plaintiff's claim.

1 ***The Plaintiff's Position***

2 20. Ms. Dunsby on behalf of the Plaintiff argues that the Court should direct its mind to
3 the overriding objective of the Grand Court Rules, namely, "... *to enable the Court*
4 *to deal with every cause or matter in a just, expeditious and economical way.*"

5 21. Furthermore, Ms. Dunsby draws this Court's attention to the provisions of GCR
6 O.15 r.6 and adds that if the Plaintiff is not successful against the First Defendant,
7 the Plaintiff needs to have the Second Defendant joined as a party in order to do
8 justice in this case.

9 22. Ms. Dunsby cites GCR O.15 r.6(e) which reads:

10 *"The addition or substitution of a new party shall be treated as necessary for*
11 *the purposes of paragraph (5) if, and only if, the Court is satisfied that the new*
12 *party is sued jointly with the Defendant and is not also liable severally with*
13 *him, and failure to join the new party might render the claim unenforceable."*

14
15 23. In addition Ms. Dunsby relies on English case law to state that a new party can be
16 joined now, and indeed, at any time after the limitation period has expired, if it's in
17 the overall interest of justice to do so.

18 ***Conclusion***

19 24. The Limitation Law sets out the correct procedure for the position and
20 circumstances in which the Plaintiff now finds herself, namely making a new claim
21 in the course of a pending action. Section 41(1) reads:

22 *"(1) For the purposes of this Law, any new claim made in the course of an*
23 *action shall be deemed to be a separate action and to have been commenced in*
24 *the case of-*

- 1 (a) a new claim made in or by way of third party proceedings, on
2 the date on which those proceedings were commenced; and
3 (b) any other new claim, on the same date as the original action.”
4

5 The definition of a “new claim” is found in s.41(2) of the Law and includes the
6 “addition of a new party”.

7 25. Section 41(3) of the Limitation Law reads:

8 “(3) Except as provided by section 39 or by rules of court, a court shall not
9 allow a new claim within paragraph (b) of subsection (1), other than an
10 original set-off or original counterclaim, to be made in the course of an action
11 after the expiry of any time limit under this Law, which would effect a new
12 action or to enforce that claim.”

13

14 26. Section 41(4) of the Limitation Law reads:

15 “(4) Rules of Court may provide for allowing a new claim to which
16 subsection (3) applies to be made as therein mentioned, but only if the
17 conditions specified in subsection (5) are satisfied, and subject to any further
18 restrictions the Rules may impose.”

19

20 27. Section 41(5) of the Limitation Law reads:

21 “(5) The conditions referred to in subsection (4) are in the case of a claim
22 involving –

23 (a) a new cause of action, if the new cause of action arises out of
24 the same facts are substantially the same facts as are already
25 an issue on any claim previously made in the original action;
26 and

27 (b) a new party, if the addition or substitution of the new party is
28 necessary for the determination of the original action.”

29

1 28. What is of particular importance in the case before me are the provisions of s.41(6)
2 which read:

3 *“(6) The addition or substitution of a new party shall not be regarded for*
4 *the purposes of paragraph (b) of subsection (5) as necessary for the*
5 *determination of the original action unless either –*

6 (a) *the new party is substituted for a party whose name was given*
7 *in any claim made in the original action in mistake for the new*
8 *party’s name; or*

9 (b) *any claim already made in the original action cannot be*
10 *maintained by or against an existing party unless the new party*
11 *is joined or substituted as plaintiff or defendant in that action.”*

12
13 29. I agree with the Second Defendant’s counsel’s submission that the Plaintiff does
14 not satisfy s.41(6)(b) of the Limitation Law, in that, the Plaintiff has a claim against
15 the First Defendant which can be maintained. I also agree with Mr. Kennedy’s
16 submission that the Plaintiff has adopted the wrong procedure in the circumstances
17 of this case.

18 30. Counsel for the Second Defendant has helpfully drawn me to the principles set out
19 in the Rules of the Supreme Court Practice 1999, and in particular, the principles
20 and guidance notes set out at O.15 r.6/4, at the bottom of page 22 of the White
21 Book, where the learned editors state:

22 *“Where a plaintiff seeks to claim against a new party at a time when the*
23 *limitation period relevant to such claim has plainly expired and the new claim*
24 *does not come within the conditions prescribed by s.35(5)(b) of the Limitation*
25 *Act 1980(s. 41(4)(b) of the Limitation Law (1996 Revision)), the proper course*
26 *is to issue fresh proceedings against the new party rather than to attempt to*
27 *amend subsisting proceedings against another party to add or substitute the*
28 *new party as a defendant. Any application by the new party to strike out the*
29 *fresh action as an abuse of process on the grounds that it is statute barred, or*
30 *by the Plaintiff, if appropriate, for an Order under s.33 of the 1980 Act (section*
31 *39 of the Limitation Law (1996 Revision)) that the action may be allowed to*
32 *proceed, may then be made by summons and adjudicated upon in the course of*

1 *the fresh proceedings. In this way, the new party has the opportunity to put*
2 *before the Court his objections to the launch of proceedings against him,*
3 *whereas, if he is added or substituted as a defendant to subsisting proceedings,*
4 *he will have been given no such opportunity, and the order giving leave to add*
5 *or substitute him may subsequently be set aside on his application in order to*
6 *prevent the limitation point being concluded against him by virtue of s.35(1) of*
7 *the 1980 Act (s. 41(1)(b) of the Limitation Law (1996 Revision)).*

8

9 31. I respectfully adopt the reasoning in this passage by the learned editors of the Rules
10 of the Supreme Court.

11 32. The Second Defendant, as with any new party, must, in circumstances such as we
12 find here, be allowed the opportunity to put before the Court its objections to the
13 launch of proceedings against it, including the defence that the Plaintiff is statute
14 barred. Therefore, I accede to the Second Defendant's application and order that the
15 amendments made under GCR O.20 r.1 by the Plaintiff be struck out as an abuse of
16 process of the Court pursuant to GCR O.15 r.6(2) as read with GCR O.18 r.19(d).

17 33. As costs follow the event I order that the Plaintiff do pay the Second Defendant's
18 costs in any event, to be taxed if not agreed.

19 34. This Ruling now allows the Second Defendant to argue the defence of limitation
20 and to support its contention with evidence, should it so wish.

21 35. Mr. Kennedy has properly conceded that the Plaintiff has a residual right to make
22 an application under s.39 of the Limitation Law, to have the Court consider whether
23 it should exercise its discretion to dis-apply the time limit under s.13 of the
24 Limitation Law in these proceedings, namely Cause 470 of 2010.

25 36. Further, Mr. Kennedy has now conceded that the Plaintiff has adopted the correct
26 procedure by filing its Originating Summons on the 25th July 2011 in Cause 289 of

1 2011 for a direction under s.39 of the Limitation Law, that s.13 of the Law should
2 not apply to the action issued in these proceedings, namely Cause 470 of 2010.

3 37. I will hear counsel for the parties as to directions on the future conduct of Cause
4 289 of 2011.

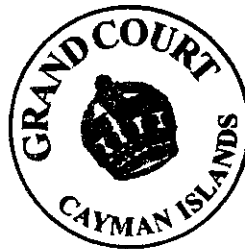
5

6

7

8 **Dated this the 24th August 2011**

9
10
11
12



13 **Honourable Mr. Justice Charles Quin**
14 **Judge of the Grand Court**

•