30/3/10

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 313 OF 2007

BETWEEN:

Edgar George Cole

Plaintiff

AND:

(1) James Smith, as the personal representative of Dwight Diedrick, Deceased

First Defendant

(2) Robert Watler Jr. (trading as Watler Metal Products)

Second Defendant

CAUSE NO. 432 OF 2008

BETWEEN:

Edgar George Cole

Plaintiff

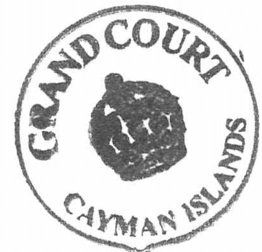
AND:

N.E.M. (West Indies) Insurance Limited

Defendant

IN CHAMBERS
THE 23rd DAY OF MARCH 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES:
Mr. Hector Robinson and Mr. Murali Ram of Mourant for the Plaintiff
Ms. Kirsten Houghton of Campbells for the Defendant



RULING

1. These two causes involve claims arising from a tragic motor vehicle accident in which the Plaintiff who was the passenger, sustained very serious injuries and in which the driver, Dwight Deidrick, was killed.

2. I now have before me an application by Mr. Robert Watler, the second defendant in Cause 313 of 2007 ("the Main Action"), for permission to amend

his defence to plead that the deceased, Dwight Diedrick, (whose estate is sued as the first defendant) was at the time of the accident, not his employee but the employee of Walter's Metal Products Limited ("the Company").

3. The proposed amendment arises against the background of there having already been a written admission on his behalf by his lawyers, that Mr. Watler was in fact the employer of Mr. Diedrick. A difficulty which Mr. Watler's application presents is that the statutory limitation periods having expired; the Plaintiff would now be statute-barred from suing the Company in respect of any vicarious liability it might have for Mr. Diedrick's negligence. This is, liability such as might be proved to ground the claim against Mr. Diedrick's employer and for which the employer's insurers may be obliged to provide an indemnity.

4. The accident, in question, occurred at about 8pm on 19th January 2005. The Plaintiff, now a paraplegic as the result of the injuries he sustained, sues Mr. Diedrick's estate for damages. That suit is the subject of the Main Action in which the second defendant Mr. Watler, is joined as the employer of Mr. Diedrick and as owner of the vehicle he was driving at the time of the accident. The second parallel action brought in Cause 432 of 2008 will be explained below.

5. Mr. Watler's present application to amend his defence arises from the following context.

6. The Plaintiff, having originally in the Main Action sued "Watler's Metal Products Company Limited" as 2nd Defendant and as putative employer of the deceased, was advised by the law firm Campbells in a letter of 27 November 2007 in these terms:

> "*We act for N.E.M. (West Indies) Insurance Limited through its local agents Balderamos Insurance Services Limited. Please be advised that the Second Defendant identified as "Watler's Metal Products Company Limited" is not an insured of our client insurer.*
>
> *Accordingly, we have no instructions or authority to accept service of the Writ against the Second Defendant filed on 25th July 2007. It is returned herewith.*
>
> *From our own enquiries with the Companies Registry we draw to your attention, that the Second Defendant is a non-existent entity.*
>
> *The registered owner of the Chevrolet pick up truck at the time of the accident was Mr. Robert Watler Jr. who we understand is also the owner and operator of Walter's Metal Products. We understand that although the late Mr. Diedrick was employed on temporary work permit with Mr. Watler at the time of this accident, on the evening of the accident he had taken and was driving the truck without the authority or permission of Mr.*

Watler or anyone acting on behalf of Mr. Watler. The late Mr. Diedrick was driving the truck contrary to the express instructions of Mr. Watler to all his employees, including Mr. Diedrick. Accordingly, Mr. Diedrick was neither an insured nor an authorized driver under Mr. Watler's motor vehicle policy.

Furthermore, under the authorized driver provision on Mr. Watler's policy all drivers were required to be 25 years of age or older. At the time of the accident, the late Mr. Diedrick was aged 22 years --- the late Mr. Diedrick had taken and was driving the vehicle on a frolic of his own.

Accordingly, our client Insurer does not accept liability for Mr. Cole's claim, nor is it required to cover any liability in respect of your client's claim."

7. It is implicit from that letter that Campbells were also speaking on behalf of Mr. Watler, no doubt relying on the right of their client N.E.M. (West Indies) Insurance Limited, ("N.E.M") to subrogate to his position.

8. As the consequence of having received the letter, the Plaintiff's attorney amended his pleadings to enjoin Mr. Watler in person, in place of the non-existent "Watler's Metal Products Company Limited".

9. Having obtained a default judgment against the deceased's estate in the Main Action; the Plaintiff instituted Cause 432 of 2008 ("the Insurance Action") in which he seeks declaratory orders declaring among other things, that pursuant to the terms of the insurance policy between the defendant N.E.M and Mr. Watler; Dwight Diedrick the deceased was a person insured under the policy. Thus, the link between Mr. Diedrick's alleged negligence, the vicarious liability of Mr. Watler as his employer and the obligation of N.E.M. to indemnify, is sought to be established.

10. In addition to the leave sought by Mr. Watler to amend his Defence in the Main Action to substitute the Company for himself, N.E.M also now seeks leave in the Insurance Action to rely upon the affidavit of Mr. Watler, sworn on 11 November 2009, to refute the Plaintiff's claim for the declaratory relief against it. The contents of that affidavit also provide the evidential basis for Mr. Watler's application to amend the Defence in the Main Action and is therefore of central importance now.

11. In it Mr. Watler will seek to attest to the following, among other things:

"(i) That I am the sole shareholder and director of the Company, which was incorporated in 1998;

(ii) That in March 2003, the Company applied for and obtained a temporary work permit in relation to Mr. Diedrick. The Company subsequently obtained "full" permits for him valid from 22nd December 2003 to 22 December 2004. That in November 2004, a renewal of the permit was sought but pending its renewal the tragic accident in which Mr. Diedrick was killed

and Mr. Cole injured, occurred on 19th January 2005. In the meantime Mr. Diedrick had remained employed to the Company working by "operation of law";

(iii) That the vehicle concerned in the accident was my personal property and was insured by me personally, as confirmed by the insurance documents exhibited in the Insurance Action;

(iv) That when the proceedings in the Main Action were originally instituted, they were issued against a non- existent company ("Watler's Metal Products Company Limited"). In the course of seeking to correct this mistake, I can confirm that a misunderstanding has risen, in that I gave instructions to the effect that I was the correct defendant, as "Watler's Medal Products" was my business, as I am the sole director and shareholder but in reality, the business is carried on under my direction and control by the Company. In the circumstances, I seek leave to amend the Defence in the Main Action, and as I was not Mr. Diedrick's employer, I should not be held vicariously liable for his actions if, contrary to my defence, he was indeed acting in the course of his employment when he took the vehicle outside normal working hours;

(v) That in my capacity as the director of the Company, and also in my capacity as owner of the vehicle, I had given strict instructions to all the employees, including Mr. Diedrick, that the vehicles were strictly for business purposes, and that they were not allowed to use them for personal use or outside working hours. I do not know how Mr. Diedrick obtained the vehicle after hours, but in doing so, he certainly acted outside my instructions and without my permission;

(vi) As there is currently an issue between myself and my insurers concerning coverage under the policy, I humbly suggest that it

would not be fair or just to me to allow these matters to proceed on the false assumption that I was Mr. Diedrick's employer."

12. The questions whether I allow Mr. Watler to amend his Defence to plead that the Company was Mr. Diedrick's employer and whether to allow N.E.M in the Insurance Action to rely on his affidavit, are indeed ultimately matters of fairness. But fairness requires that I consider not only what is fair to Mr. Watler and to N.E.M but also whether unfair prejudice might redound to the detriment of the Plaintiff as the consequence of granting their applications.

13. Ms. Houghton and Mr. Robinson were agreed on the basic legal principles applicable to the grant of leave to amend pleadings as set out in the case law: An amendment to pleadings would be permitted to assist in determining the real question in controversy between the parties or to correct an error or defect, unless the party proposing the amendment was not acting bona fide or the defect was such that the amendment could not be made without causing injustice to another party which could not be compensated by an award of costs. While the Court had a duty to assist a party seeking to amend its pleadings to clarify or correct its case, it would not do so if that would unduly prejudice the other side. Nor, for the obvious reason that it would be an abuse of the process of the Court and a waste of time and costs; would an amendment be granted which would be bound to fail.

See ***Grupo Torras v Bank of Butterfield Intl (Cayman) Limited and others*** 2001 CILR 9 at 19; citing the earlier decision of this Court in ***Cayman Hotel and Golf Inc v Resort Gems Limited*** 1992-93 CILR 372, at 385-86.

14. Mr. Robinson argued against the grant of leave to amend the Defence primarily on the basis that the Plaintiff would be unduly prejudiced. He cited the further well settled principle which is implicit in the foregoing statement of the law and further discussed and developed in ***Blackstone's Civil Practice 2008 Ed Ch 31*** para 31.21 in these terms:

> "A defendant will not be given permission to amend where the effect of the proposed amendment is to transfer responsibility for the claim on to a non-party who cannot be sued by the claimant as a result of the expiry of the relevant limitation period. An example is *Seward v North Metropolitan Tramways Co.* (1886) 16 QBD 556, where the claimant sued the tramways for personal injuries. After the expiry of the limitation period, the defendant sought to amend its defence. The effect of the proposed amendment [would have been] to transfer the defendant's liability for the claimant's injuries to the local road authority. Permission to amend was refused, because even an order for costs could not put the claimant into the same position as if the proposed defence had been pleaded at the proper time.
>
> This approach was confirmed in ***Cluley v R.L. Dix Heating*** [2003] EWCA Civ 1595 where the court dismissed an argument that the prejudice was caused by the claimant

> having failed to identify the proper person to bring proceedings against; rather than caused by the defendant seeking, after the expiry of limitation, to withdraw an admission of having entered into a contract with the claimant.
>
> Much depends on whether the defendant has been at fault in not pleading the proposed defence at the proper time…"

15. Relying on that statement of principle, it was argued by Mr. Robinson that immediate prejudice to the Plaintiff would arise if the Court were to grant Mr. Watler's application to amend, as the Plaintiff would naturally seek to join the Company as a defendant. As the Company would then have an iron-clad defence that the claim against it is statute-barred, both under section 13 of the Limitation Law (1995 Revision) and section 17 of the Motor Vehicle Insurance (Third Party Risks) Law (2007 Revision); the Plaintiff would lose its recourse as against Mr. Watler and as against the Company (as the case might be) in either's capacity as employer of Mr. Diedrick.

16. Section 13 of the Limitation Law provides that an action for negligence, where the damages claimed consist of or include damages for personal injuries, shall not be brought after the expiration of 3 years from the date on which the cause of action accrued, or the date of knowledge (if later), of the person injured.

17. Section 17 of the Motor Vehicle Insurance (Third Party Risks) Law provides that no action shall lie after the end of the period of three years from the date

on which a cause of action accrued for any injury or damage against or in respect of which a motor vehicle is required to be insured under that Law.

18. The cause of action, as did the Plaintiff's knowledge of his injury arising from the accident, accrued on the date of the accident, 19th January 2005; and so a claim against the Company is now statute-barred under both of these statutory limitation provisions.

19. It is correct to say therefore that the defendant Mr. Watler, due to his own fault, made an admission in his defence, which, if he were allowed to resile from it now, could result in the prejudice to the Plaintiff in having any claim it might have statute-barred as against the defendant Company.

20. His application seems on first impression therefore, to be disallowed by the strictures of the case law upon the exercise of the discretion for the grant of an amendment.

21. However, Ms. Houghton argued otherwise in her submissions. She said, to begin, that the need for the amendment is caused by a genuine mistake and the application is made in good faith. She placed heavy reliance on the decision in ***Gale v Superdrug Stores Plc*** [1996] 1 WLR 1089 that (as taken from the headnote):

> "When a defendant sought to withdraw or amend an admission the judge had to balance the prejudice which the defendant would suffer if he was deprived of his prima facie right to resile from his admission against any prejudice which the plaintiff stood to suffer if the admission was withdrawn; that prejudice had to be

> established specifically; that the lack of a good reason for the defendants' change of position was merely one factor to be considered, and the discretion of the judge was a general one in which all the circumstances had to be taken into account…"

22. I acknowledge that that dictum embodies a restatement of the principles earlier developed in the case law as discussed above, but looked at specifically as to whether an amendment should be allowed by withdrawal of an admission which was tantamount to an admission of liability. It all comes back, therefore, to an assessment of the competing risks of prejudice.

23. Here, while it may be accepted that the situation was brought about by a genuine mistake on the part of Mr. Watler, who may well have confused his de facto relationship as his employer with Mr. Diedrick's legal relationship with the Company; I must consider whether any real risk of prejudice will arise to the Plaintiff in not being able to sue the Company if Mr. Walters' defence is allowed to plead that Mr. Diedrick was the Company's employee and not Mr. Watler's.

24. Another way of framing the issue is whether, on the facts as presently pleaded, the Plaintiff may well have a case against Mr. Watler based on Mr. Watler's admission, a case which he would be required to relinquish by virtue of the proposed amendments.

25. I proceed to examine the issues as so defined.

26. The value to the Plaintiff of any case he may have either against Mr. Watler or the Company would, of course, be in the vicarious liability that either may have as employer to indemnity him for damages suffered as the consequences, as it is alleged, of Mr. Diedrick's negligence.

27. That,in turn, gives rise to the question of the ability of either to provide that indemnity and thus to the importance of the question whether N.E.M. as insurer, may be ultimately liable to provide that indemnity. That is the link between the two causes of action already mentioned above.

28. It appears from the insurance documentation that Mr. Watler was indeed the insured and not the Company.

29. It appears that the vehicle driven at the time of the accident by Mr. Diedrick belonged to Mr. Watler, not to the Company.

30. Accordingly, were his amendments to be allowed, Mr. Watler as the insured Policy holder may be able to plead both that Mr. Diedrick was not his employee and that he has no vicarious responsibility for his negligence for which he or his insurer could be liable.

31. For its part the Company, as the uninsured employer, would have no liability whatsoever, because the vehicle that was being driven by its employee was not its own, was not, therefore, being driven in the course of its employment or on its authority or permission, and so was not being driven in circumstances for which it could be vicariously or otherwise liable and for which it ought to be insured.

32. By the foregoing analysis if the proposed amendment is allowed, it would seem that while the Plaintiff already has his judgment against Mr. Diedrick's estate; any hope of a recovery for Mr. Diedrick's negligence on the basis of the vicarious liability of an employer can find no footing.

33. This does not mean however, that there is no hope of a recovery otherwise on the basis that an insurance indemnity might be available under the policy of Mr. Watler, but in his capacity as the owner of the vehicle driven by Mr. Diedrick allegedly with his permission or authority.

34. Whether this is so will be a matter of law and fact for the trial. So too would the question whether the age limitation prescribed in the Policy is applicable. Nevertheless, in a more limited sense, the terms of the policy as part of the circumstances of this case must now be considered on this application.

35. The Policy covered the vehicle in question, a Chevrolet truck, registration no. 98036 ("the Vehicle") which was owned by Mr. Watler and admittedly used for the purpose of his business, Watler Metal Products ("the Business"), which he operated through the Company.

36. The Certificate of Insurance describes Mr. Watler as "the Policyholder" and the "Person or classes of person entitled to drive" as "Any person provided he/she is in the Policy holder's employ and/or is driving on the Policy holder's order or with his permission and who is 25 years of age or older…"

37. The first thing to note for the purpose of the present applications, is that whether the required relationship of employment existed as one of the bases

for coverage under the Policy is a matter of contract as between Mr. Watler and N.E.M. It is not simply a matter of fact that might be determined based only on Mr. Watler's admission in the proceedings.

38. Moreover, in this jurisdiction, what ever the factual admissions in proceedings may be, the legal relationship of employment as between an employer and a putative employee who is a foreigner; is also a matter to be determined by operation of the Immigration Laws.

39. A copy of the relevant work permit for Mr. Diedrick is exhibited to Mr. Watler's affidavit. Issued pursuant to section 38 (2) of the Immigration Law (2003 Revision); it authorised Mr. Diedrick "to enter, re-enter and remain in the Cayman Islands and there follow the occupation of labourer in the employment of Watler's Metal Products Ltd.," (the Company). The permit stipulates on its face, among other things, that the holder shall not be employed other than by the employer named, without prior approval of the Immigration Board.

40. There is no evidence to support any assumption and it is not suggested, that the Board granted approval for Mr. Diedrick to be in the employment of Mr. Watler himself, simultaneously with the Company; even if it may be assumed from Mr. Watler's admission that that was the de facto situation.

41. By dint of the Immigration Law, this Court is therefore bound to accept that the statutory legal relationship of employment was that as between Mr. Diedrick and the Company.

42. The rules of pleading, and specifically those first cited above, do not require or allow the Court to overlook the legal reality of the circumstances of the case when deciding whether to allow a party to amend his pleadings.

43. Even more to the point of the arguments presented based on unfairness or potential prejudice to the Plaintiff's case, I do not think that a party can be allowed to plead to a factual situation that is rendered false by virtue of the operation of law; which would be the situation here were Mr. Watler to be prevented from amending his Defence and the Plaintiff allowed to rely on the legally false (even if factually accurate) admission that Mr. Diedrick was Mr. Watler's, but not the Company's, employee.

44. Nor can denying the Plaintiff the ability to do so be regarded as prejudicial to his case, because in law he must be regarded as never having had a case by which he could rely on a legal relationship of employment between Mr. Watler and Mr. Deidrick, in the first place.

N.E.M's application in the Insurance Action

45. Similar considerations dictate the outcome of the plea of estoppel by representation raised by Mr. Robinson on behalf of the Plaintiff in bar to N.E.M's application to rely on Mr. Watler's affidavit in the Insurance Action; in particular to rely on Mr. Watler's correction of the earlier admission that Mr. Diedrick was his employee rather than the Company's.

46. This for reasons already identified, may be of importance to N.E.M's case (as subrogated to Mr. Watler's position).

47. The statement of the principles of estoppel by representation relied upon by Mr. Robinson comes conveniently from ***Halsbury's Law of England 4th Ed.*** Volume 16(2) para 1052:

> "In order for estoppel by representation to operate, there must have been a representation made by the person to be estopped to the person claiming with benefit of the estoppel. To form the basis of an estoppel a representation may be made either by statement or by conduct; and conduct includes negligence and silence. Certain general propositions are, however, applicable, in whatever manner the representation is made. The representation must be voluntary; if made apparently on another's behalf, it must be made by a person having the authority to do so; it must be communicated to the person to whom it is addressed and only the person to whom it was addressed may use it to support a plea of estoppel."

48. On the basis of that statement of the principles, it would appear that the Plaintiff should be able to plead estoppel against Mr. Watler resiling from the admission made to the Plaintiff that Mr. Diedrick was his employee as, by having relied on it to implead Mr. Watler in place of the Company, the Plaintiff's case against the Company such as it may have been, may now be statue-barred. And if Mr. Watler is estopped so would N.E.M, which stands in his position.

49. But that, in light of the foregoing examination of the circumstances of this case, is not to be the end of the matter. Diedrick was employed to the Company, not to Mr. Watler and so the following further principles apply; again as conveniently taken from Halsbury op. cit para 1053:

> "A party cannot by representation, any more then by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its power or to refrain from doing what it is its duty to do; the same principle applies to individuals."

50. Thus, Mr. Watler cannot be estopped from denying that Mr. Diedrick was not his employee in the face of the legal reality that, by the Immigration Law, he was the Company's employee. But even that conclusion does not necessarily mean that the interests of fairness will not be served in the case.

51. Whether the de facto relationship of employment existed between Mr. Watler and Mr. Diedrick such as to afford the Plaintiff a basis for a claim against Mr. Watler himself as the Policy holder and hence against N.E.M. as the indemnifier; remains a question of fact to be answered irrespective of the legal statutory relationship of employment. It seems that that question can be posited in terms of the following proposition of common law: "A person who does not have the general status of employee can nevertheless be "in the

employ of" the insured if carrying out a one-off transaction for them: See ***Burton v Road Transport & General Ins. Company Ltd.*** (1939) Lloyd's List LR 253. The proposition may be a *fortiori* applicable in a case like this where the Company, the legal employer; may be regarded as little more than the alter ego of Mr. Watler, the de facto employer.

52. There is also already identified the further question for trial whether in any event, Mr. Diedrick was driving with Mr. Watler's permission.

53. The resolution of those factual questions is in no way affected by my conclusion now that neither Mr. Watler nor N.E.M may be estopped from relying on what was the true legal nature of the relationship of employment as between Mr. Diedrick and the Company.

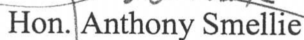
54. Accordingly, my conclusion is that Mr. Watler may amend his Defence to make the changes to the factual averments as propounded in draft in the Main Action and, in the Insurance Action; neither N.E.M. nor Mr. Watler is estopped from relying on Mr. Watler's affidavit in which he cites the legal relationship of employment between Mr. Diedrick and the Company.

Joinder to an extant cause after the expiry of a limitation period

55. Ms. Houghton's acknowledgement that the Plaintiff may apply for the joinder of the Company as a defendant notwithstanding the expiry of the statutory limitation periods, is worth noting in passing.

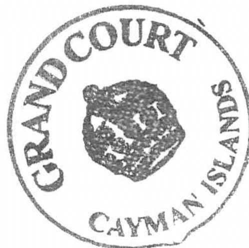
56. She submitted that if the Plaintiff needs to join the Company, he would likely be able to benefit from the provisions of Grand Court Rules ("GCR") Order 20 rules 5(2) and (3) and/or GCR Order 15 rule 6(1), 12, 5 (a) and 6(e). Section 41(6)(b) of the Limitation Law may also be applicable.

57. In summary, and at risk of over-simplification; these are the Rules of Court which govern the circumstances under which the Court might allow the joinder of a party to an already existing action, notwithstanding the expiring of the statutory limitation periods that may apply to the institution of a new action against that party. Whether such a recourse may be worth taking on the Plaintiff's behalf will be a matter for his legal advisors to consider. In this regard the cases of ***Omni Securities Ltd. & Deloitte and Touche and nine others*** 2000 CILR Vol. (C.A.) and ***Evans Construction Co. Ltd. v Charrington & Co. Ltd***. [1995] Q.B. 810 should be instructive.



Hon. Anthony Smellie

Chief Justice



Dated 30th March 2010