

civil

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON THE CHIEF JUSTICE

ON THE 15TH JULY 1992

CAUSE # 92 OF 92

BETWEEN	WILLY GIGER	PLAINTIFF
AND	COCONUT HARBOUR	DEFENDANT

Mrs. Messer for the plaintiff  
Miss Brooks for the defendant

MALONE C. J.                      JUDGMENT

On this application for leave to amend the defence and counterclaim, objection was taken only to the proposed amendments to the counterclaim.

The amendments objected to plead that in breach of his duty the plaintiff negligently failed to allot certain rents received by him to necessary aspects of the business he managed for the defendant and to pay tourist accommodation tax to the Government. As a result the Government obtained a judgment against the defendant in the sum of \$117,891.00. The pleading continues that the money is not still in the company operation. By way of relief the defendant claims:

"For non-payment of Government Tourist Accommodation tax from January 1989 - July 1991 in the sum of CI\$117,891.00 including a surcharge for non-payment."

The writ in this action was filed on the 12th March 1992. The counterclaim was served thereafter and before the judgment in favour of the Government was entered on the 8th June 1992. Relying on Eshelby v Federated European Bank Ltd. (1931) 1 K.B. 254 Miss Brooks' first submission is that the amendment is not justified because it admits a new cause of action which had accrued since the date of the writ and did not exist at that

date. That new cause of action, Miss Brooks submitted, was the claim to \$117,891.00 as she contended that until the Government got its judgment that claim did not exist.

The Court will refuse to allow an amendment to introduce a new claim that did not exist at the date of service of the original pleading which it is sought to amend. (Eshelby's case) (ibid). It will not, however, refuse to allow an amendment simply because it introduces a new claim. Nor will it refuse to allow an amendment which is merely additional to an existing cause of action.

The amendment applied for by the defendant does not change the cause of action into one of a substantially different character and it is founded on facts that relate back to July 1991. Those facts were crystallised, as it were, by the judgment obtained by the Government. As a consequence the claim which had been lying dormant became a claim for special damages. Such damages have to be pleaded. Often they are pleaded with some such words as "and continuing" but there are circumstances when they may be dealt with by way of amendment of the pleadings. This, to my mind, is one of these circumstances. Accordingly I am of the view that this claim does not arise from a new cause of action as like the other claims of the counterclaim it is based on alleged negligence by the same party in the performance of his duty as manager of the defendant's business. It is simply an additional claim for special damages. If even it is a new cause of action, it is not one that did not exist at the date of service of the original counterclaim. Therefore I reject Miss Brooks' first submission.

Miss Brooks' other objections to granting leave to amend the counterclaim are that:

- (1) The plaintiff should have been made a third party to the Government's action against the defendant.

(2) The action is one of negligence but the claim to the \$117,891.00 is based on theft.

(3) The plaintiff is prejudiced in this action because the defendant acknowledged its liability in the action brought against it by the Government.

It may very well be that the defendant could have joined the plaintiff as a 3rd party to the action brought by the Government. Because it did not do so does not, however, prevent it from suing the plaintiff. As I have earlier said, the defendant's counterclaim alleges negligence on the part of the plaintiff. Its pleading that the \$117,891.00 is not in the operation of the company is not an allegation of theft. Indeed there is no allegation of theft. Finally the defendant's admission of liability in the proceeding brought by the Government can in no way prejudice the plaintiff. The position in which he finds himself is precisely the same as he would have been in had he been a third party to the Government's action against the defendant and the latter had then admitted liability.

For the foregoing reasons, those objections of the plaintiff which I have referred to as the plaintiff's other objections are rejected.

In the result leave is granted to the defendant to amend its defence and counterclaim filed on the 8th April 1992.

*Denis E. Malone*

Sir Denis Malone

13th August 1992.