CAYMAN ISLANDS

IN THE COURT OF APPEAL

C.I.C.A. MISC. 3 of 1990

BEFORE : THE HONOURABLE PRESIDENT
THE HONOURABLE MR. JUSTICE KERR J.A.
THE HONOURABLE MR. JUSTICE HENRY J.A.

BETWEEN EXECUTIVE AIR SERVICES LTD.
EDWARD BODDEN
MARJORIE BODDEN Defendants/Appellants

AND

JAMES E. MACDONALD Plaintiff/Respondent

Mr. LaMontagne Q.C. for Appellants
Mr. Foster for Respondent

August 3,6,9 1990 and November 28, 1990

REASONS FOR JUDGMENT

By summons dated March 7, 1990 the Respondent sought leave to join Mrs. Marjorie Bodden, the wife of Edmund Bodden the Second Defendant in the action, as a Defendant, and to reamend the writ of summons and statement of claim. On March 26, 1990 by a written ruling leave was granted as prayed. This is an appeal against that ruling. There is also a Respondent's notice contending that the ruling should be affirmed on grounds other than those relied on by the court below.

Essentially two grounds of appeal were argued on behalf of the Appellants, one relating to the joinder of Mrs. Bodden as a Defendant, the other relating to the amendment of the statement of claim. The first is that rule 26 of the Grand Court (Civil Procedure) Rules did not confer on the court jurisdiction to add Mrs. Bodden as a Defendant in circumstances in which it was being alleged that she was a joint tortfeasor. The second is that the proposed paragraph 4 of the amended ststement of claim either served no useful purpose or, in breach of the principle established by Salomon v. Salomon (1895-9) All E.R. 33 alleged a breach by Mrs. Bodden of a contract to which she was not a party.

Rule 26 of the Grand Court (Civil Procedure) Rules which is in similar terms to the corresponding English rule prior to its amendment in 1973, provides as follows:

"26. No cause or matter shall be defeated by reason

> of the misjoinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may, at any stage of the proceedings, either upon or without the application of any party and upon such terms as may seem just, order the names of any parties improperly joined, whether as plaintiffs or defendants, to be struck out and the names of any parties added who ought to have been joined, whether as plaintiffs or defendants, or whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter:
>
> Provided that no person shall be added as a plaintiff, or as the next friend of a plaintiff under a disability, without his own consent in writing thereto."

The rule has consistently been held to provide for the addition as plaintiffs or defendants of two categories of persons:

(1) those who ought to have been joined at the commencement of the proceedings, and

(2) those whose presence may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.

In the present case the application to add Mrs. Bodden was made on the basis that she belonged to the first category of persons. The allegations against her in the proposed amended statement of claim are set out in the judgment of the learned trial judge as follows:

> "That at all material times:
>
> 1. she was one of the three shareholders, directors and officers of the first defendant of which the other two were the second and third defendants;
> 2. the business and activities of the first defendant were carried on by the second and third defendants and herself effectively as a family partnership;
> 3. she was aware of, did authorise and actively participate in the activities of the first defendant and in particular herself and the second and third defendants were each individually aware of, did authorise and participate in each of the acts and defaults subsequently set out in the pleading in so far as the same may have been purportedly done in the name of the first defendant."

Counsel for the Appellants submits that the words "ought to have been joined" in relation to the proposed addition of a defendant indicates an obligation on the part of the plaintiff at the time of the commencement of the action to name that person as a defendant. If there was no such obligation, he submits, the rule cannot apply. Consequently in the present case where the proposed action against Mrs. Bodden is as a joint tortfeasor and there was no obligation on the plaintiff to name her as a defendant in addition to the other joint tortfeasors when the action was originally brought the rule, he submits, cannot apply. He concedes that this submission is contrary to the decision in Edward v. Lowther (1876) 45 L.J.P.C. 417, but submits that that decision must be regarded as overruled by dicta in subsequent cases, notably Moser v. Marsden (1892) 1 Ch, 487, Amon v. Raphael Tuck & Sons Ltd. (1956) 1 Q.B. 357 and Vandervell Trustees Ltd. v White et al. (1970) 3 All E.R. 16. These later cases are however distinguishable as we will show.

In Edward v. Lowther (supra), an action against the publisher of a newspaper for libel, the plaintiff, having discovered as a result of interrogatories that one Matthew Green was the sole proprietor of the newspaper, applied to add Mr. Green as a defendant. The application was refused by the Master on the ground that it did not come within Order 16 rule 13 of the Judicature Act, 1875 (which was in the same terms as rule 26 of the Grand Court (Civil Procedure) Rules.) On appeal it was held that the application should be granted. In construing the provision "that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined" may be joined Lord Coleridge C.J. stated:-

> "I think that this means that a person may be added as a defendant who ought to have been such defendant for the purpose of general convenience, and of doing justice in the subject-matter of the suit. Now, as Mr. Green, whom it is proposed to add as a defendant, is clearly a person against whom if the plaintiff's case is right, relief may be sought, and who might have been made a defendant in the first instance, so I think he is one who may now be properly ordered to be joined as a defendant on such terms as the Court may think just."

Moser v. Marsden was an action by the patentee of a machine against the user of a machine in an alleged infringement of the patent. The maker and patentee of the defendant's machine applied to be added as a defendant under what had then become Order 16 rule 11 of the Rules of the Supreme Court, 1883. The application was granted by the Vice-Chancellor of the County Palatine. On appeal it was held that the court had no jurisdiction to do so. In the course of his judgment Lindley L.J. observed:-

> "There may be a score of persons like Marsden using this particular machine, but there is no law or equity to oblige the plaintiff to sue all of them. Therefore it is clear that it cannot be said that the case comes within that part of the rule which provides that the Court may order the names of any parties, whether plaintiffs or defendants, 'who ought to have been joined,' to be added. In no sense can it be said that Montfors ought to have been joined as a party to this action."

This dictum would on the face of it seem to support the submission of counsel for the Appellants in the present case. But while it is no doubt appropriate in the circumstances of Moser v. Marsden where the application to add a defensant was being made by that proposed defendant, in our view different considerations would arise in the case of an application by a plaintiff to add a defendant. In considering in relation to such an application the meaning of the words "The Court may .. order the names .. of any parties added who ought to have been joined" it is necessary to consider who are the parties who ought to be joined when an action is brought. It is necessary also to bear in mind the object of rule 26. Whether that object is, as Evershed J considered in Bentley Motors Ltd. v. Lagonda (1945) 2 All E.R. 211 at 213 "to render unnecessary a multiplicity of proceedings" or as Devlin J considered in Amon v. Raphael Tuck & Sons Ltd (supra) to replace the plea of abatement and to ensure that all the necessary parties to the action are before the court, it seems clear that the rule must contemplate that a plaintiff ought to take advantage of the provisions of rule 25 for the joinder of parties. That rule provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative. It follows therefore that a plaintiff ought to join as defendants in one action all the persons from whom he wishes to

claim relief jointly, severally or in the alternative. It follows also that where a plaintiff brings an action against one or more joint tortfeasors and subsequently wishes to claim relief against another joint tortfeasor that other joint tortfeasor "ought to have been joined" and may by virtue of rule 26 be added as a defendant in the original action. If, as counsel for the Appellants submits, rule 26 cannot apply in the present case, the plaintiff would have to bring a separate action against Mrs. Bodden and the object of rules 25 and 26 would be defeated.

In Amon v. Raphael Tuck & Sons Ltd. (supra) Devlin J. dealt in some detail with the application of the rule. He refers to the common law practice to join parties "who ought to have been joined" in the strict sense, such as joint contractors (p. 380) but nowhere in his judgment does he express disapproval of the decision in in Edward v. Lowther (supra). In any event whereas Edward v. Lowther was concerned with the meaning of those "who ought to have been joined" (and is indeed the only case to which we have been referred which was so concerned) Amon v. Rahpael Tuck Amon v. Raphael Tuck & Sons Ltd. was concerned with the meaning of those "whose presence may be necessary.."

In Vandervell Trustees Ltd. v. White et al. (supra) Viscount Dilhorne expressed disapproval of the interpretation of the rule given by Lord Denning M.R. in Re Vandervell Trusts (1969) 3 All E.R 496 at 499 when he said:

> "We will in this court give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so."

The interpretation by Lord Denning, which was subsequently effected by amendment of the rule, appears to reflect the "just and convenient" concept in Lord Coleridge's dictum in Edward v. Lowther which we have earlier quoted. But Lord Coleridge was dealing with the meaning of Order 16 rule 3 in its application to Order 16 rule 13 whereas Lord Denning with the application of Order 16 rule 13 (Order 15 rule 6) itself. We do not therefore consider that Viscount Dilhorne's disapproval could necessarily be regarded as extending to Lord Coleridge's dictum.

For these reasons we were of the view that the Appellants' first ground of appeal failed.

In so far as the second ground of appeal is concerned counsel for the Appellants submits that paragraph 4 of the proposed amended statement of claim is in the form of it wide enough to suggest that the Respondent is seeking relief against Mrs. Bodden not only in tort but also in contract. Paragraph 4 makes the allegations to which we have earlier referred. The paragraphs in the statement of claim which follow paragraph 4 deal both with allegations of breach of contract and with allegations of tort. In alleging that Mrs. Bodden authorised and participated in each of the acts and defaults subsequently set out in the pleading in so far as the same may have been purportedly done in the name of the first defendant the paragraph could well be interpreted as alleging breach of contract as well as tort. Counsel for the Respondent submits that the alleged tort arises from facts which also constitute breach of contract, and that the final claim makes it clear that damages for wrongful detinue and conversion are the extent of the claim against Mrs. Bodden. This may be so, but in our view the last sentence of paragraph 4 was in any event too wide in its terms and, in view of other pleadimgs in the statement of claim, unnecessary to support a claim for detinue and conversion only. For this reason we allowed the appeal to the extent only of varying the order of the learned trial judge so as to delete the last sentence of paragraph 4 of the amended statement of claim. In the circumstances we considered that the Respondent ought to have one half of the costs of the appeal, and we so ordered.