JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 20/81

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROWE, J.A.

BETWEEN: THE GLEANER COMPANY LIMITED - DEFENDANT/APPELLANT

A N D : ARNOLD FOOTE - PLAINTIFF/RESPONDENT

Mr. Emil George, Q.C. for the defendant/appellant.

Mr. Hugh Levy for the plaintiff/respondent.

January 28 and 29; June 4, 1982.

CARBERRY, J.A.:

This is an appeal from the order of the Master made on the 7th April, 1981, giving the plaintiff/respondent leave to amend the endorsement on his writ.

The record placed before us is meagre in the extreme. There are no notes of the argument that took place before the Master, nor any indication of what the argument was about, or the reasons that led the Master to make his order granting the order in terms of the Summons as amended. The formal order appears at page 12 of the Record. What is the history of this matter?

It appears that on the 16th September, 1980, the plaintiff through his attorney-at-law Mr. Hugh Levy Jnr., filed a writ claiming damages for libel, from the defendant company.

The original endorsement reads:

"Endorsement

The Plaintiff's claim against the Defendant is to recover damages for libel contained in the issue of the Daily Gleaner of the 22nd April, 1974 and published on divers occasions subsequently up to and including the month of February 1975."

The words underlined in the endorsement above represent the words which the plaintiff sought in his amendment to delete, and to replace with others set out below.

Two preliminary comments might be made at this stage: the endorsement on the writ lacks particularity, (though in this respect the model endorsement set out in the Jamaica Civil Procedure Code Schedule II suffers similarly); as I understand it, each publication of a libel represents a separate cause of action, and in practice should be specified in the writ. Paragraph 6 of the Civil Procedure Code requires that the writ should be "endorsed with a statement of the nature of the claim made, or (i.e. and) of the relief or remedy required in the action."
(Compare the New U.K. R.S.C. O 6 R 2).

Paragraph 10 of our Code says that it is not essential to set forth the precise ground of complaint, while paragraph 11 requires the endorsement to be to the effect of the prescribed form in Schedule II applicable; but paragraph 17 states:

> "In actions for libel the endorsement on the writ shall state sufficient particulars to identify the publications in respect of which the action is brought."

Paragraph 194 of our Code states however:

> "Whenever a statement of claim is filed the plaintiff may therein alter, modify or extend, his claim without any amendment of the endorsement of the writ."

This corresponds to the New U.K. R.S.C. O 18 R 15 (2), but our rules lack the preliminary sentence:

> "A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to the cause of action so mentioned; but subject to that ....." (it continues as in our Code, para. 194 above).

As the rules indicate, subject to a particular exception which is crucial in this case and is discussed at length later, the Statement of Claim subsequently delivered may cure the lack of particularity in the endorsement on the writ, and defective writs may be cured by the

Statement of Claim, whether it be delivered with the writ: Hill v. Luton Corporation (1951) 2 K.B. 387; or subsequently: Grounsell v. Cuthell & Linley (1952) 2 Q.B. 673 and see generally Pontin v. Wood (1962) 1 Q.B. 594; (1962) 1 All E.R. 294; and Sterman v. Moore (E.W. & J.) (1970) 1 Q.B. 596; (1970) 1 All E.R. 581.

The second comment that may be made is to observe that at the time this writ was filed the six year period of limitation fixed by the U.K. Imperial Statute - The Limitation Act of 1623, which mirabile dictu, we still use in Jamaica, had expired or very nearly expired in respect of the publications alleged.

On the 12th March, 1981, by a summons returnable on the 24th March, 1981, Mr. Levy took out on behalf of the plaintiff/respondent a summons to amend the endorsement on the writ. We were informed by counsel that this was in fact the second such summons: an earlier one to the same effect had been filed on 9th February, 1981, ex-parte, for hearing on the 24th February, 1981, when it was adjourned to 11th March, for service on the defendant/appellant. On 11th March it was adjourned sine die when Mr. Levy failed to appear: hence the fresh summons of the 12th March, 1981.

This summons sought (a) to delete the words underlined in the original endorsement above, and (b) to substitute instead: (contained):

> "..... in articles headed "TWO BUSINESSMEN UNDER POLICE PROBE AFTER CAPTURE OF PILOT AT AIRSTRIP" and libel published by means of the juxtaposition of the said article with one headed: "U.S. PILOT, PLANE DETAINED" as well as by means of an article headed: "POLICE STEP UP DRIVE TO CRACK GUN-GANJA RING" and printed by the Defendant and published on page one of the issue of "The Daily Gleaner" newspaper dated 22nd April, 1974 and 27th April, 1974 and republished in March, 1975."

It appears from comparing the amendment sought in this summons with that which appears in the formal order, that it was amended by deleting the underlined "March, 1975" above, and substituting "on the 28th March, 1975."

The proposed amendment brought a welcome degree of particularity to the previous endorsement's "published on divers occasions subsequently up to and including the month of February, 1975," and complies with

paragraph 17 of the Code, set out above.

The proposed amendment also brought strenuous opposition from the defendant/appellant, though we have no record of what was argued, we assume it was similar to the argument taken before us on appeal.

After argument on the 24th of March, 1981, the Master reserved his decision and it was adjourned to the 1st April, 1981; on the 1st April it was further adjourned to the 7th April, 1981, for reasons which we cannot tell, but on the 7th April, 1981 the Master gave his decision: he made an order in terms of the summons as amended, giving the defendant the costs thereof, and also leave to appeal to this Court.

The application to amend was made under paragraph 259 of the Code:

> "259. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

This paragraph in the Jamaica Civil Procedure Code corresponds practically verbatim to the old U.K. R.S.C. O 28 R 1; it has been replaced in the U.K. by Order 20 R 5, which contains some alternations very significant to this case, which we have not so far incorporated in our Code.

It is useful at this time also to refer to the provisions of paragraphs 265, 266 and 267 of the Code. Paragraph 265 "Time to amend by leave" provides for the time within which a party who has secured leave to amend must actually amend. It is, if not specified in the order giving leave, fourteen days from the date of the order. If the amendment is not made within that period, the order to amend will become void, unless time is extended.

Paragraph 266 "How amendments to be made" provides how the amendment is to be made: inter alia it is to be filed, and paragraph 267

"Entry of amendment on record" provides that the party procuring an amendment shall cause the registrar to amend the pleadings, mark the amendment with the date of the order, if any, under which the same is so amended, "and of the day on which such amendment is made, ..."

These paragraphs correspond to the old U.K. S.C.R. O 28, R. 7, 8, and 9 replaced by the new U.K. S.C.R. O 20 R 9 and 10.

The significance of these provisions relating to the machinery for making amendments is that they clearly indicate that the amendment is not made when the order granting leave to make it is passed or approved, but that the amendment is made when the consequential steps have been followed, particularly in filing the same in the registry, and getting the registrar to note the amendments on the Court's copy of same. After all, a party may seek and get leave to amend, and decide not to do so after all, and the rules provide that unless he makes the actual amendment within the time indicated in paragraph 265, the leave lapses, and it is as if the amendment had never been made, (unless the time is extended). The distinction between getting leave to amend and actually amending appears not only in the rules, but also in the cases, some of which are mentioned below.

It does not appear anywhere in the record in the instant case that the plaintiff has in fact actually yet made the amendment which he got leave to make. He could not have done so before the 7th April, 1961, when he got leave to amend from the Master, and he does not seem to have done so since.

Though the provisions with respect to amendment in paragraph 259 of the Code, and in the corresponding old U.K. O 28 R 1 are in the widest possible terms, the Courts have for nearly one hundred and fifty years imposed upon themselves a limitation as to their power of amendment when it impinges upon the relevant Statute of Limitations. This is understandable.

The Legislature or Parliament has passed a statute, or a series of enactments which prescribe that actions must be "commenced" within a specified period of time, and if not commenced within the prescribed

time, they shall be barred. Without legislative sanction (now given to some extent in the United Kingdom by the Limitation Act of 1975) the Courts cannot overrule a statute. In general an action "commences" when the plaintiff attends on the Court and applies for and gets a writ; a copy is filed in Court, and he obtains copies which he may serve upon the other side. The Court controls its own procedures, by rules and otherwise. It prescribes the time within which the writ must be served, or it will lapse and become ineffective, unless it is renewed. The Court also prescribes and controls the content of the writ, and the pleadings: control of the time allowed for service in effect adds to the time within which, so far as the defendant is concerned, the action "commences": until he is served, as far as he is concerned the action has not started. Control of the time for service permits a de facto extension of the limitation period prescribed by the Legislature. Control of the content of the writ, for example by allowing it to be amended or added to, but still regarding it as "commencing" when filed, can lead to clear evasions of the statute of limitation in question. Further, permitting writs to be amended to add new parties, while still regarding the "commencement" of the action as the day on which the writ was originally filed, can similarly lead to evasions of the Limitation Acts prescribed by the Legislature.

In the result there are a series of cases dealing with (a) renewals of lapsed writs after the limitation period has passed; (b) the adding of new parties to writs after the limitation period has passed; (c) alterations in the capacity of the parties after the limitation period has passed; and (d) amending to add new causes of action after the limitation period has passed. All of these cases are closely related and the reasoning in them apply indifferently to the four situations indicated above.

In the instant case, the defendant/appellant complains that the effect of the amendment which has been granted to the plaintiff/respondent, and which he opposed before the Master, has been to enable the plaintiff to add to his writ new causes of action that had become statute barred

at the date of the leave granted to amend.

This complaint cannot relate to the added particulars in respect of the publication of 22nd April, 1974. That had been specified in the original endorsement, and the amendment now merely gives details of it. The complaint relates to the alleged publications of 27th April, 1974, and republication on the 28th March, 1975. It is arguable that when the original endorsement spoke of "published on divers occasions subsequently up to and including the month of February, 1975" those words are apt to cover the allegation of publication on 27th April, 1974. Before the amendment the allegation as to "divers publications" was hopelessly vague and imprecise, but it could have been cured by the Statement of Claim without the intervention of the Court. By virtue of the amendment the original allegation of "divers publications" has shrunk to one, viz. the 27th April, 1974.

However, the allegation in the amendment of "republished on the 28th March, 1975" does not fall within the original endorsement which said "up to and including the month of February, 1975."

This then is a new and added cause of action not covered by the original endorsement, and if statute barred it is a legitimate source of complaint. Was it statute barred? The argument before us has proceeded on the basis that under the Limitation Act of 1623, the appropriate period of limitation is six years from the date of publication, and this is accepted for the purposes of this case. The six year period would have expired on the 28th March, 1981. The date on which the application was filed, (12th March, 1981), was heard (24th March, 1981) and on which leave was granted (7th April, 1981) have already been noted. The application then was barely in time: the purported grant of leave was not, nor was any application made to the Master to backdate the leave, on a nunc pro tunc basis, assuming that that could have been done. Further, though leave has been granted, the amendment does not appear to us to have yet been made!

In what follows the rule of self limitation of the discretion to make amendments is examined, as also the cases on when is an amendment made? Is it made when leave is granted, or only when it is in fact made by using the appropriate machinery? Finally it will be necessary to see if there exist in this case any "exceptional circumstances" which would lead the Court to by-pass its own rules on this matter? How strict are they?

This limitation, or self limitation on its powers of amendment by the Court is a rule of practice. Though there are earlier examples of its application in cases dealing with renewals of lapsed writs out of time, the earliest leading case dealing with amendments that add new causes of action after expiry of the relevant limitation period is Weldon v. Neal (1887) 19 Q.B. 394 (C.A.). The headnote is short and terse. It reads:

> "A plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations."

There was much to be said for the plaintiff in that case. She had applied at trial to amend, and the judge had refused leave. She had appealed to the Court of Appeal and won a new trial and leave to amend her Statement of Claim, but by the time she actually amended it the claims in the amendment had become statute barred.

The Divisional Court then ordered the paragraphs setting out the amendments to be struck out, on the ground that they would deprive the defendant of the benefit of the Statute of Limitations.

The plaintiff returned once more to the Court of Appeal, alas in vain. Giving his judgment, at page 395, Lord Esher said:

> "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments.
>
> If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute, and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust.

> Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so ... ."

Having made his remark about allowing such an amendment under "very peculiar circumstances" he added that there were none such here!

Lindley L.J. concurred and Lopes L.J. added, at page 396:

> "I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, viz. that, however negligent or careless the first omission and however late the proposed amendment the amendment should be allowed if it can be allowed without injustice to the other side. But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant."

I think that the circumstances here show how strictly the rule was enforced. It might well have been argued that had she got her amendment originally from the trial judge, she would have been in time. Another comment that should be made is that the situation is looked at as at the "date of the amendment": would a writ issued on that date have been statute barred?

Finally it is to be observed that the "date of the amendment" is not the date on which she got leave from the Court of Appeal, nor the date of the original trial when she should have got leave. It is instead the date on which she actually made the amendments.

It is also necessary to look beyond the judgment to the basic approach. It rests on the theory that an amendment of a pleading once granted "relates back" to the original date of the pleading. As it was put by Collins, M.R. in Sneade v. Wortherton Barytes and Lead Mining Co. Ltd. (1904) 1 K.B. 295 (C.A.) at 297:

> "..... the leave to amend involves that the claim as amended may be treated as if it were the original claim in the action. ....
>
> Upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon endorsed is substituted for the claim originally endorsed."

In Mabro v. Eagle Star and British Dominions Insurance Company Ltd. (1932) 1 K.B. 485 (C.A.) actually a case of an attempt to add a new party after the Limitation Period had run, Scrutton L.J. said at page 487:

> "In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute."
>
> (Emphasis supplied).

The rule in Weldon v. Neal (supra) was followed in Marshall v. London Passenger Transport Board (1936) 3 All E.R. 83 (C.A.); see Lord Wright, M.R. at pages 87 and 88; and also in Batting v. London Passenger Transport Board (1941) 1 All E.R. 228 (C.A.) where Sir Wilfred Greene, M.R. said at page 230 A:

> "Accordingly, the amendment, if it were allowed, would result in the raising of an entirely new case of negligence not covered by the writ at all, a case which, in view of the date of the application, would have been raised for the first time several months after the expiration of the period of 6 months mentioned in the Public Authorities Protection Act, 1893."

Weldon v. Neal (supra) continued to be followed in a long line of U.K. Court of Appeal cases, for example National Provincial Bank v. Gaunt (1942) 2 All E.R. 112 (C.A.); Hall v. Meyrick (1957) 2 Q.B. 455 (C.A.); (see Hodson L.J. at page 479) (1957) 2 All E.R. 722. For reasons which are briefly discussed later, though the basic principle continues to exist and to be applied from time to time, changes made in the U.K. Limitation Acts and in the U.K. Rules of the Supreme Court have altered the situation there, curing some old problems while introducing others.

The rule in Weldon v. Neal has been accepted and followed in Jamaica, where we have had cases of amendments being disallowed as having introduced new causes of action after they had become statute barred: see Fletcher v. Wright (1947) 5 J.L.R. 77 (C.A.) (citing and following National Provincial Bank v. Gaunt (supra); Charlton v. Reid

(1960) 3 W.I.R. 33 (C.A.) (citing and following Weldon v. Neal (supra)); Hall v. Meyrick (supra); Mabro v. Eagle Star etc. Insco Co. Ltd. (supra); and our own Fletcher v. Wright (supra); and Clunis v. Johnson (1954) 6 J.L.R. 335 (C.A.) (following National Provincial Bank v. Count (supra) and Fletcher v. Wright (supra).

We have also had similar cases involving the renewal of lapsed writs out of time, after the limitation period had passed: see Administrator General v. Sewell and Jamaica Omnibus Services Ltd. (1969) 14 W.I.R. 24. See also Gayle v. Reid (1965) 9 J.L.R. 67 (wrongful renewal of lapsed writ, but the limitation period was not involved).

It should be noted that the power to extend time though the application for extension is made out of time, under paragraph 676 of the Code, (the equivalent of the old U.K. S.C.R. O 64 R 7, now O 3 R 5) will not be exercised when the Statute of Limitations or some similar statute is involved. As Lord Greene, M.R. said in Hilton v. Sutton Steam Laundry (1946) 1 K.B. 65; (1945) 2 All E.R. 425: (an attempt to alter the capacity in which the plaintiff was suing under the Fatal Accident Acts), at page 73:

> "But the Statute of Limitations is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the Statute of Limitations is entitled, of course, to insist on his strict rights. He is similarly entitled to insist on the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings."

Cases such as Hilton's case (supra) which saw a widow deprived of her remedy under the Fatal Accident Acts and the Law Reform Act have led in England to amendments to the Limitation Act of 1939 in 1963 and again in 1975 which have given to the Courts the power to extend the limitation period in certain cases, notably personal injury claims; while the new O 20 R 5 (Amendment of writ or pleading with leave) has given to Courts the power to make amendments despite the fact that the period of limitation current at the date of the writ has expired. There is still controversy and conflicting decisions in the English Court of Appeal over the width and scope of the powers now given, i.e. as to whether they apply generally or only to the cases specifically referred to. Be that

as it may, it is of interest that decisions have confirmed that these amendments to the English Supreme Court Rules which give the Courts the power to amend despite the Limitation Act, have been held to be intra vires the power of the Rules Committee, thus restoring or liberating the English Courts from some of the consequences of self limitation imposed by the rule in Weldon v. Neal; see Rodriguez v. Parker (1967) 1 Q.B. 116 and Mitchell v. Harris Engineering Co. Ltd. (1967) 2 Q.B. 703 (C.A.).

Speaking of the changes introduced by the new O 20 R 5, Lord Denning, M.R. in Chatsworth Investments Ltd. v. Cussins (contractors Ltd. (1969) 1 All E.R. 143 said at page 145:

> "The courts in former times fettered themselves by the rule of practice in Weldon v. Neal which was applied rigidly and strictly. Any amendment was disallowed if it would deprive the defendant of a defence of the Statute of Limitations. But that rule of practice was found to work injustice in many cases. The new R.S.C. Ord. 20 R 5 (2), (3), (4), and (5) has specifically overruled a series of cases which worked injustice. Since the new rule, I think we should discard the strict rule of practice in Weldon v. Neal. The courts should allow an amendment whenever it is just so to do, even though it may deprive the defendant of a defence under the Statute of Limitations."

In Jamaica we have not had, unfortunately for plaintiffs, and perhaps for those who represent them, the benefit of these changes. Indeed it may come as a surprise to many to know that large sections of our litigation are still governed by a Statute of Limitations made over 350 years ago, the U.K. Limitation Act of 1623; and that no copy of it exists in our own Laws of Jamaica, and it has long since ceased to appear in any current set of the Laws of England, save as to one small section.

The Courts in Jamaica still "fetter themselves by the rule of practice in Weldon v. Neal," and to quote Lord Greene "Once the axe falls it falls."

It should not however be imagined that plaintiffs and their representatives in England have now become immune from the rules of pleadings and the Limitation Acts; the rules with respect to dismissing actions for want of prosecution are enforced, and the House of Lords in

Walkley v. Precision Forgings Ltd. (1979) 2 All E.R. 548 has shown that the dilatory plaintiff can expect no help under the new legislation.

It is convenient to take together the two remaining points in this case: When is an amendment made? Can it be said that despite the strict rule in Weldon v. Neal there exists here the "exceptional circumstances" envisaged by Lord Esher which would induce the Court to grant the amendment despite the passage of the limitation period? Can it be said that while the plaintiff waited till the very last moment to apply for his amendment, still it is due to the delay by the Master in granting it, that he has run into his present predicament?

As has been already pointed out, the rules in the Civil Procedure Code clearly point to the proposition that an amendment or some similar dispensation is not made when leave is granted, but only when the actual machinery has been set in motion and the amendment (or renewal of the writ) has actually been made and duly sealed and entered in the Court's registry. Under the rule the back dating of orders, on a nunc pro tunc basis, is not allowed.

In Mazer v. Wade (1861) 1 B & S 928 the plaintiff's attorney on the very day on which his writ expired attended the Court's office and paid his fee for renewal, but being called away neglected to get the renewal duly stamped or sealed, and did not discover his oversight till the limitation period has passed. Held that the Court would not apply the nunc pro tunc principle to defeat a limitation of actions defence.

This was followed in Evans v. Jones (1862) 2 B & S 45, where the last day for resealing fell on Saturday 28th December, and on attending the office it was found to be closed. He attended on Monday 30th December, but the officer refused to reseal it then, and the Court refused to order him to do it afterwards nunc pro tunc. See too Doyle v. Kaufman (1877) 3 Q.B.D. 7 and 340: The Court held it had no power under the order allowing for enlarging of time etc. to extend the time for renewing a writ where the claim would in the absence of such renewal be barred by the Statute of Limitations. To the same

effect is Hewett v. Barr (1891) 1 Q.B. 98 (C.A.); and Duchin v. Swansea U.D.C. (1954) 2 All E.R. 817. In this last case Havers, J. reviewed the cases referred to above, and dealt with an argument very similar to that advanced by the plaintiff in our case. He said at page 821 E:

> "Counsel for the plaintiff contended before me that, under Ord. 8 R 1, the procedure for renewal consisted of two stages, the judicial act of making an order which was discretionary and, the second stage, the purely ministerial act of impressing a seal on the writ. He argued that, if the judicial act was done within a stipulated period, the writ remained in force for service even though the ministerial act was not done until after the expiration of the stipulated period. I am unable to accept that argument. In my view, though an order for renewal must now first be obtained, the renewal is still effected by the sealing of the writ in the manner prescribed by the order...."

In Baker v. Bowketts Cakes Ltd. (1966) 2 All E.R. 290(C.A.) a situation not unlike that in the instant case occurred: here the writ had been issued but not yet served. Four days before the writ's one year for service expired, the plaintiff's attorney applied for renewal, but the registrar adjourned the application for consideration to a date beyond the one year period. Desperate efforts were then made to serve the writ, by post, but unfortunately it was sent to the wrong address and not served in time. Plaintiff's attorney now tried to get the writ renewed out of time. He persuaded the judge below to renew it. The defendant entered a conditional appearance and applied to set aside the service. The same judge who granted renewal now reversed his decision and refused it. This was confirmed by the Court of Appeal. Lord Denning M.R. at page 292 after reviewing the cases relating to the discretion to extend time not being exercised when to do so would defeat a defence under the Statute of Limitations, observed:

> "If the plaintiff delays until the very last minute he has only himself to thank. If it is his solicitor's fault, he can blame them; but he ought not to get an extension, to the prejudice of the defendants, except for good cause....."

There was no suggestion that the adjournment by the registrar was the cause of the plaintiff being in delay.

It may perhaps be said that all of those cases deal with the renewal of lapsed writs out of time. That is so, but the principles at work are precisely the same as those involved in making amendments to pleadings after the limitation period has passed. It is perhaps significant that in the hundred or more years that have elapsed since Lord Esher in Weldon v. Neal indicated that there might be "exceptional circumstances" that might induce a Court to break its settled rule of practice, no case has come to attention in which this has occurred, though the law reports on these cases are liberally strewn with "hard cases."

As to when the amendment takes effect, it is useful to look at Seabridge v. H. Cox & Sons (Plant Hire) Ltd. (1968) 2 Q.B. 46 (C.A.). That case related to an amendment to join a defendant, that was made on the anniversary date, that is the very last day on which the Limitation Act period in respect of that defendant expired. Lord Denning, M.R. at page 52 remarks:

> "I am prepared to hold, therefore, that when an amendment is made adding a defendant, the amendment takes effect when it is stamped in the Central Office. It takes effect at that moment against that defendant equivalent to the issue of a writ against him ....."

In the circumstances of this case I can find no "exceptional circumstances" that would prevent the rule in Weldon v. Neal from applying, and that would justify an amendment that would deprive the defendant/appellant of its right to rely on the Defence of the Statute of Limitations in respect of the portion of the amendment that is contained in the words "and republished on the 28th March, 1975." Those words do introduce a fresh cause of action into the writ, after it had become barred by the Statute of Limitations, for the amendment it appears has not yet been "made", and certainly could not date any earlier than the order of the 7th April, 1981, giving leave to make it. For the rest, the other parts of the amendment are unexceptionable. I would therefore vary the order of the Master by deleting from the amendment which he

gave leave to make the words "and republished on the 28th March, 1975" leaving the rest of the amendment to stand. The rest of the amendment does not put the defendant in any worse position than he was in before it was made, and it was covered by the original endorsement and should be allowed to stand. It merely puts in proper form the claim previously made. I would therefore allow the appeal to the extent indicated, and as the defendant/appellant has succeeded on the real point in issue, I think that he should get the costs of the appeal. He already was properly granted costs in the application before the Master.

ZACCA, PRESIDENT: - I agree

ROWE, J.A.: - I agree