Neutral Citation Number: [2013] EWCA Civ 1555

Case No: B3/2012/3293

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ Cotter QC
[2012] EWHC 3355

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2013

Before :

THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE HALLETT, VICE PRESIDENT OF CACD
and
LADY JUSTICE SHARP

- -

Between :

NEMETI and OTHERS	**Appellant**
- and -	
SABRE INSURANCE CO. LTD	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

- -

Mr Frank Burton QC and Mr Philip Mead (instructed by **Levenes, Wood Green, London**) for the **Appellant**
Mr Howard Palmer QC and Ms Marie Louise Kinsler (instructed by **Weightmans, Liverpool**) for the **Respondents**

Hearing date : 7th November 2013

- -

Approved Judgment

Judgment
As Approved by the Court

Lady Justice Hallett :

Vice President of the Court of Appeal (Criminal Division):

The background

1. This appeal concerns the powers of the court to allow the addition or substitution of a new party to litigation notwithstanding the expiry of the relevant limitation period.

2. The Appellants are all Romanian nationals. They now claim that on 29 December 2007 Mr Ioan Bura took his father's car without permission and was driving it, uninsured, along a road in Satu-Mare Municipality, Romania when he lost control and collided with a bridge. He died in the crash and the Appellants, his passengers, suffered personal injury. The car was owned by Mr Bura senior and insured by the Respondent insurance company.

3. The Appellants' claims, based on the alleged negligence of Mr Ioan Bura, are subject to a 3 year non-extendable limitation period under Romanian law. This expired in late December 2010. Shortly before, each of the Appellants issued proceedings against the Respondents directly. The original Particulars of Claim set out the facts of the accident, the particulars of the alleged negligence, and the damage caused and sought payment from the Respondents under Regulation 3 of the European Communities (Rights against Insurers) Regulations 2002. At that time the Appellants believed that the Respondents insured Mr Bura junior.

4. In certain circumstances, Regulation 3 provides a right of action against motor vehicle insurers where an "entitled party" (generally a resident of a member state of the European Union) "has a cause of action against an insured person in tort ….. and that cause of action arises out of an accident". Without prejudice to the entitled party's right to sue the insured tortfeasor, he may sue the insurer who is directly liable "to the entitled party to the extent that he is liable to the insured person".

5. However, the 2002 Regulations do not apply on these facts because the allegedly negligent driver was not the "insured tortfeasor" and the accident took place outside the United Kingdom. The Respondents accordingly applied to strike out the claims. The Appellants' legal advisers realised they had made a mistake but after the limitation period had expired. They applied to add/substitute the Estate of the deceased Mr Bura to the litigation, arguing it would cause no prejudice to the Estate or the insurers each of whom had had ample notice of their possible liability. They hoped, thereby, to take advantage of the "relation back" principle enshrined in section 35 of the Limitation Act 1980 to have the proceedings against the Estate deemed to have been commenced on the same day as the proceedings were issued against the Respondents. They do not expect to be in a position to enforce any judgment obtained against the Estate (which has not been notified of the application). They hope to rely upon a different statutory provision, namely section 151 of the Road Traffic Act 1988, to oblige the Respondents, as insurers of the vehicle, to satisfy any judgment.

6. There is no evidence about the Estate before us. We are in the curious position, therefore, of considering an appeal based on an application to deprive a proposed party to litigation of an accrued statutory defence and leave them open to a real

liability to pay damages to the Appellants (or to reimburse the Respondents under section 151 of the 1988 Act) without receiving representations from them. Further, no one has dwelled upon the interesting jurisdictional questions that might arise if the litigation becomes an action for negligence brought by Romanian nationals (possibly by now residents outside the United Kingdom) against the estate of a Romanian national in relation to an accident which occurred in Romania.

7. The original Claim Form gave brief details of the claims which were for "damages for personal injuries and losses" arising from the accident and referred to the Respondents' "duty to indemnify their insured for negligent acts or omissions" under Regulation 3. The only significant differences in the original Particulars of Claim and the proposed Particulars are the deletion of the paragraph in which reliance was placed on the 2002 Regulations and the substitution of the "The Estate of Mr Ioan Daniel Bura" for the Respondent insurance company as Defendant. The road traffic accident, the alleged wrongdoing, and the relief sought (damages for personal injury) all remain the same.

8. Master Eastman, who is very experienced in personal injury litigation, noted all these features and concluded the claims as now advanced and the claims as previously advanced are the same claims in negligence for damages for personal injury. By order dated 19 July 2012 he authorised the substitution of the Estate for the Respondents. The Respondents appealed to HHJ Cotter QC sitting as a Judge of the High Court. On 23 November 2012 he allowed the appeal. The application to amend was dismissed, the claims struck out and judgment entered for the Respondents.

9. Permission to appeal was granted by Floyd LJ on 4 July 2013, on the following basis: "Grounds 1-3 give rise to arguable points of law raising an important point of principle and practice in the light of the decisions in Irwin v Lynch [2010] EWCA 1153, Parkinson Engineering Services plc v Swan [2009] EWCA Civ 1366 and Yorkshire Regional Health Authority v Fairclough Building Limited [1996] 1 WLR 210."

Statutory framework

10. Each of the decisions to which Floyd LJ referred involved a consideration of Section 35 (5) (b) of the Limitation Act 1980.

11. Section 35 provides where relevant :

> "35.— New claims in pending actions: rules of court.
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> ….. (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
>
> (a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party; …….

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim …….

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or Defendant in that action…….

12. The Appellants rely specifically upon the provisions in section 35(5)(b) and (6)(b). It is not suggested the other provisions are relevant save as contextual material.

13. The relevant rules of court are now the Civil Procedure Rules ("the CPR") of which CPR 19. 5 provides as follows:

"(2) The court may add or substitute a party only if – (a) the relevant limitation period was current when the proceedings were started; and (b) the addition or substitution is necessary.

> (3) The addition or substitution of a party is necessary only if the court is satisfied that – … (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as Claimant or Defendant…"

14. The requirement of CPR 19.5 (2) (a) has been fulfilled. The only issue to be determined, therefore, is whether the amendment is "necessary" within the section and the rule. It is common ground that CPR 19 cannot expand the ambit of section 35 and that although CPR 19 is expressed slightly differently from section 35, the effect is the same.

15. To put the issue in context, Mr Howard Palmer QC for the Respondents provided a helpful summary of the four categories of case where there is the power to allow a new claim to be made outside the limitation period so that the "relation back" principle apples:

> Category 1: cases of succession.
>
> Category 2: cases where the Claimant wants to add a fresh cause of action which arises out of the same facts or substantially the same facts as are already in issue on any claim made in the original action.
>
> Category 3: cases where it is necessary to substitute a new party for a party whose name was given in any claim made in the original action in mistake for the new party.
>
> Category 4: cases where any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as Claimant or Defendant in that action.

16. It is common ground this case comes within Category 4 or not all. A mistake has been made but not of the kind which would fall into Category 3.

The Appeal

17. Mr Frank Burton QC for the Appellants advanced the 3 grounds upon which he obtained leave. However, it became increasingly clear during argument that there is, in truth, just the one ground: that the judge was wrong to find section 35 did not apply and there is no power to order substitution on the facts of this case.

18. Mr Burton's first line of attack was to accuse the judge of taking too restrictive a view of section 35 and the circumstances when substitution can take place. HHJ Cotter appears to have been influenced by the argument that the members of the Law Reform Committee in 1977, whose recommendations led to the enactment of section 35 and a change in the then rules of court, took a restrictive approach. It was said that they wished to see a change in the law but only to permit amendments out of time where the new joinder was a 'technical necessity'.

19. Mr Burton referred us to paragraph 41 of the judgment below in which, having reviewed the legislative history of section 35 in some detail, the Judge observed:

> "41. The matters I have set out support the general proposition advanced by Mr Palmer QC that the sections within the 1980 Act in issue in this appeal allowing the addition or substitution of a party are necessarily restrictive as to the very limited circumstances in which it is permissible to deprive a Defendant of the accrued right of a limitation period. These sections are solely aimed at errors in the constitution or formality of the action, relating to the parties joined to it, or the capacity in which they sue or are sued, which made the extant action unsustainable. The addition or substitution of parties had to be necessary to cure some defect."

20. Mr Burton suggested this passage was inconsistent with recent decisions of the Court of Appeal which, he claimed, have liberalised the approach to applications to amend under section 35. He gave two examples in which Lloyd LJ gave the lead judgment neither of which were placed before the judge.

21. In *Parkinson Engineering Services plc (in liquidation) v Swan and another [2009] EWCA Civ 1366* the claim could not be maintained by the original claimant, a company in liquidation, but only by the company's liquidator. Both the original claim and the amended claim were identical (save for the parties) and the Court had no difficulty in concluding section 35 was intended to apply and allowed the substitution.

22. In *Irwin v Lynch [2011] 1 WLR 1364* in which the roles were reversed, the Court allowed the addition of a company to litigation commenced by the company's liquidator where the claim could only be maintained by the company. Again, the Court held that the claim was "identical" "but with a substituted and correct claimant".

23. Mr Burton suggested that in the following passage Lloyd LJ rejected a restrictive approach to section 35.

> "19. By contrast, in relation to cases other than mistake the rules are now not in the same form as they were under the RSC . In my judgment, while it may be useful to have regard to the historical development of the legislation and the rules on this topic, the court's task on this appeal is, as the judge's was below, to construe CPR r 19.5(2)(3)(b) in the light of section 35 of the 1980 Act and in accordance with normal principles of construction. Whether or not the members of the Law Reform Committee would have foreseen what is found to be allowed under the current regime is not of any assistance either way."

24. For my part, I was not convinced that this passage was intended to indicate a rejection of the restrictive approach. It was more a rejection of the theory that what the members of the Law Reform Committee envisaged in 1977 could be of any great relevance to a court confronted with the task of construing the Act and subsequent procedural rules in the twenty first century. Had *Irwin v Lynch* been put before HH Judge Cotter, he may not have spent as much time as he did researching the history. However, it does not follow that his decision would have been any different. The amendments allowed in both *Parkinson* and *Irwin* were of a kind which obviously fell

within the terms of the subsection and would have met HHJ Judge Cotter's criteria. No doubt the members of the Law Reform Committee would have described the amendments as a "technical necessity" to maintain an identical cause of action.

25. Another example of what is said to be a more liberal approach is to be found in the decision in *Merrett v Babb [2001] 1 QB 1174*. Miss Merrett had applied jointly with her mother, Mrs Scheppel, for a mortgage to buy a property which, after purchase, she discovered required significant repair. She sued Mr Babb, a surveyor, seeking damages for negligent valuation. He argued, inter alia, that she could not sue for the whole of the loss because she had only a half interest in the property. The Court held (Aldous LJ dissenting) that it was "necessary" within the meaning of section 35 (5) (b) that the mother be added as a party because the original action could not be maintained without her (see the judgment of May LJ at paragraph 53 and Wilson J, as he then was, at paragraph 64). "The realistic analysis of the original action is that it included a claim for the loss sustained by Mrs Scheppel; and, obviously, such part of it cannot be maintained against Mr Babb without her joinder as a claimant…" (per Wilson J).

26. Again, it was not clear to me how far this decision assisted the cause of the Appellants. Miss Merrett's original claim was for the whole sum: her mother's share of the damages as well as her own. That claim (for the whole sum) could only be maintained if her mother was added as a party. That is a very different situation from the one that confronts us.

27. In the latest decision to which we were referred: *Insight Group v Kingston Smith [2013] 3 All ER 518* Leggatt J reviewed, amongst other decisions, HHJ Cotter's judgment below. He agreed with the result but not necessarily the rationale. Both sides placed reliance on paragraph 91 of the judgment. Mr Palmer highlighted the fact that Leggatt J did not doubt "the correctness of the (Judge Cotter's) conclusion" and Mr Burton referred to the passages in which he appears to question Judge Cotter's reference to the subsection being "solely aimed at errors in the constitution or formality". At paragraph 96 Leggatt J observed that from the decisions in *Parkinson* and *Irwin v Lynch* he derived the principle "that the court has power to order substitution under section 35 (6)(b) and r.19.5(3)(b) if (1) a claim made in the original action is not sustainable by or against the original party and (2) it is the same claim which will be carried on by or against the new party." Mr Palmer described this formulation of the test as "bland".

28. With respect to all concerned, I find the debate on whether section 35 should be interpreted in a generous or restrictive fashion somewhat sterile. I do not find it helpful or necessary to decide whether one can detect what Mr Palmer called a "reluctance on the part of the legislature to allow accrued (substantive) rights of limitation to be lost by the procedural device created by section 35(1)". I am distinctly wary of adding any gloss to the statutory provisions as HHJ Cotter purported to do in paragraph 41.

29. I prefer to construe the unvarnished words of the section which, to my mind, are clear: section 35 (3) provides there is no power to allow an amendment "e*xcept as provided for*" by the Act or rules of court. Rules of court may provide for allowing a new claim to which subsection (3) applies to be made but *only if the conditions specified* in subsection (5) apply. Thus, the section provides for amendment outside the limitation

period in specified circumstances only. The question for the court, therefore, is whether or not a particular claim and proposed amendment come within its terms. The court has no power to allow a new claim to take advantage of the relation back principle unless it does. There is no power and general discretion "to do justice" where a mistake has been made of the kind made here, however appealing Mr Burton may make the Appellants' cause.

30. That brings me to the nub of the argument and Mr Burton's second line of attack namely whether, whatever approach one adopts, the amendment sought here does come within the provisions of subsection (5)(b) and (6)(b). He suggested the correct way to read subsection (6)(b) is as follows:

> "(b) any claim (*for relief*) already made in the original (*cause of*) action cannot be maintained by or against an existing party unless the new party is substituted as Defendant in that (*cause of*) action."

31. On Mr Burton's analysis: the claim for relief throughout was a claim for damages for personal injury. The underlying cause of action was identical throughout: the original and the present claims are for damages for personal injury based on the alleged negligence of Mr Bura. The claim in its amended form is "identical" to the original claim just as it was in *Parkinson* and *Irwin*. The Appellants cannot pursue the original claim against the Respondents direct and thus, the original cause of action cannot be maintained unless the Estate is substituted as a Defendant.

32. Mr Burton took us to the most recent authoritative review of this area of the law which is to be found in *Roberts v Gill [2011] 1 AC 240* in the judgment of Lord Collins of Mapesbury JSC. It too involved a consideration of the application of section 35 but a different subsection. Mr Roberts had sued solicitors to his grandmother's estate in his personal capacity as the beneficiary of her will. He applied to amend the proceedings so as to sue both on his own behalf and on behalf of the estate in a derivative capacity. He lost. On the issue of necessity, the Supreme Court held it was not 'necessary' to join the administrator of the estate in order to make up any defects in the personal claim of the original Claimant. Mr Palmer suggests that this decision does not suggest a more liberal approach and is supportive of his position. However, Mr Burton relied upon paragraph 41 of Lord Collins' judgment for the approved definition of a cause of action:

> "It is sufficient to quote what Robert Walker LJ said in Smith v Henniker-Major & Co (A firm) [2003] Ch 182 (CA) at [96]. He referred to the classic definitions by Brett J in Cooke v Gill (1873) LR 8 CP 107, 116 as "every fact which is material to be proved to entitle the plaintiff to succeed", and by Diplock LJ in Letang v Cooper [1965] 1 QB 232, 242-243 as "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person,".

33. Mr Burton repeatedly emphasised that here the cause of action, the underlying "factual situation", was the road traffic accident (in which the Appellants were injured and for which Mr Bura was allegedly responsible) and the claim for damages for personal injury. The Appellants are simply trying to establish by an indirect route

what they could not establish by a direct route, namely a liability on the part of the insurers to pay for the damage caused by the negligence of a driver of an insured car. In the former claim the cause of action sought to claim against the insurer direct; in the substituted claim, the Appellants seek a remedy against the Estate in respect of which statute imposes a duty on the insurer to indemnify the Appellants.

34. Mr Burton criticised the judge for placing too much emphasis on the form of the action (originally a claim under statute as opposed to a claim in negligence) and not enough emphasis on the reality. The judge, it is said, failed to identify the fact that common to each claim is the existence of a personal claim for personal injury by the Appellants against the driver, relying on the same breach of duty, causation and loss.

35. Thus, he maintained that the judge was wrong on the facts to conclude that this amendment was not necessary to maintain the original action and wrong in law to conclude, as he did in paragraph 42, that the amendment "must be necessary for the maintenance of the existing action, not for the assertion of a new action."

36. Mr Burton read paragraphs 41 and 42 of the judgment as the judge refusing to contemplate any circumstance other than either mistake or formal succession to liability in which it was permissible to allow substitution. If so and if the judge has concluded that substitution of a Defendant can only occur where it does not involve a new cause of action, he was wrong (see the judgment of Millett LJ in *Yorkshire RHA v Fairclough Building [1996] 1WLR 210* cited with approval by Lord Collins in *Roberts v Gill*).

37. The facts in *Yorkshire RHA* were that the Yorkshire Regional Health Authority ("YRHA") brought proceedings for breach of contract and negligence in respect of works carried out at their hospital premises. Constant re-organisation of the National Health Service ("NHS") seems to have been as much a trend in the 1990s as it has been in recent years and the YRHA was succeeded by an NHS Trust which was in turn succeeded by the Northern and Yorkshire Regional Health Authority ("NYRHA"). An application was made and granted for the Trust to be joined in the proceedings and substituted for the YRHA. The Court of Appeal dismissed an appeal by the one of the Defendants. The ratio is straightforward: where a party dies or is dissolved and another entity is substituted to carry on the action or defence, this does not involve the making of a 'new claim' within the meaning of section 35. It raises no issue of limitation and is, therefore, outside the scope of section 35. Section 35 is concerned with the addition and substitution of a new party which involves a new cause of action and which is capable of raising questions of limitation.

38. Accordingly, I agree that if the judge did conclude that substitution could only be allowed in cases of mistake or succession where a new cause of action is not involved he would be in error. I believe Mr Palmer would also agree with that proposition. But, I fear Mr Burton has misunderstood the judge's remarks. The judge knew he was dealing with a proposed new cause of action. He would not have been in section 35 territory had it been otherwise. In paragraph 42, he was simply focussing on the words of the section and the question of whether it was (to paraphrase the judge) "necessary to maintain the original action" to add or substitute a party. He was not asserting that his powers were limited in the way Mr Burton claimed.

Conclusions

39. I turn to my conclusions on the substance of the appeal.

40. The limitation regime is designed to ensure, within reason, that potential defendants and their insurers are put on notice within a reasonable time so that an effective investigation of the claim can take place and that books can be closed after a reasonable time. Subject to the interests of the Estate and provided the ultimate target as paymaster remains the Respondents, neither of those principles would be offended here. The Respondents received reasonable notice of the claims and their possible liability and have been on notice throughout. The claims have always been based on the alleged negligence of the driver of the vehicle insured by them and the Estate could have been joined to the action at any time within the limitation period. If this was simply a matter of "doing justice" and discretion, therefore, one might sympathise with Master Eastman's approach.

41. However, at this stage of the process, this is not a matter of discretion. It is a matter of statutory construction. Absent section 35 and CPR 19 there is no power to substitute the deceased's Estate outside the limitation period. The Appellants must bring themselves within the section if their claim based on the driver's negligence is to proceed. In my view they cannot. There is a flaw in Mr Burton's analysis of the original cause of action. When he listed the essential ingredients of the original cause of action, he stopped at the negligence of the driver and the relief sought. He ignored the additional and vital element in the original claim for relief against the Respondents, namely the provisions of Regulation 3. The cause of action (the factual situation which entitles a person to obtain a remedy) against the Respondents may have been based on Mr Bura's negligence but it derived from statute. Had it not been for Regulation 3, there could be no claim against them.

42. Regulation 3 required certain conditions to be fulfilled. Thus, in a properly constituted claim under Regulation 3 there would have been additional assertions in the Particulars to the effect that the accident occurred in the United Kingdom and the tortfeasor was insured by the Defendant. The claim for relief would have referred to the Regulation and presumably sought payment from the Defendant 'to the extent that (the Defendant) was liable to pay the insured tortfeasor' as per the Regulation. The original claim was not, therefore, a claim for damages for personal injury against the Respondents, as Mr Burton insisted. It was not a claim in negligence. It was effectively a claim for an indemnity under statute (as the Claim Form made clear) limited to the Respondents' liability to their insured.

43. By contrast, the new claim is a claim in negligence against the alleged tortfeasor. The claim for relief is a claim for damages for personal injury allegedly caused by that negligence. Any judgment would be against the Estate. The fact that the Appellants, if successful, may be entitled to recover payment from the Respondents of "any sum" found due, under section 151 of the 1988 Act, is beside the point for these purposes.

44. Thus, although the late Mr Bura's alleged negligence underlies both claims, the claims are not the same. It is not simply a matter of form. In substance these are two different causes of action.

45. A deliberate decision was taken at the outset, no doubt for tactical and financial reasons, to sue one defendant, the Respondents, on a particular cause of action rather than sue another defendant, the Estate, on a different cause of action. After the expiry

of the limitation period, the decision was taken to pursue the Estate because the first cause of action could not be maintained. It was properly constituted but doomed to fail for substantive reasons. No amount of amendment could save it. The proposed substitution of a new party is not designed to maintain the original claim; it is designed to launch a new claim against a new party. A mistake was made but not the kind of mistake the section was designed to remedy. The Judge was correct, in my view, to find that the amendment is not "necessary for the determination of the action".

46. In those circumstances, nor is it necessary to consider the Respondents' notice and the issue of discretion. I would dismiss the appeal.

Lady Justice Sharp:

I agree.

The Chancellor of the High Court:

I also agree.