BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

No. 1637 of 2001

BETWEEN:

DENNIS PENISTON ***Plaintiff***

AND

THE BARBADOS TRANSPORT BOARD ***First defendant***

JONATHAN BOYCE ***Second defendant***

Before the Honourable Madame Justice Elneth Kentish, Judge of the High Court in Chambers.

2005: June 08, 15

Mr. John Connell Q.C. in association with Miss Traece Codrington for the Plaintiff.

Mr. Leslie Haynes Q.C. in association with Mrs. Kaye Williams for the Defendants.

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DECISION

The Application

1] This is an application filed 9 April 2003 by the defendants for an order pursuant to Order 27 Rule 3 of the Rules of the Supreme Court that the admission of liability made on their behalf contained in the letter dated 10 November 1998, written by United Insurance Company Limited, the insurer of the first defendant to the plaintiff's then attorney-at-law, Mr. Ralph Thorne be withdrawn.

2] The affidavit of the Mr. Christopher N.S Grosvenor, Claims Manager of the first defendant's insurer, filed on 13 January 2004, in support of the application, asserts that the admission of liability was an error as the plaintiff was incorrectly categorized as a passenger in one of the buses of the first defendant and not as an employee of the first defendant. This error, it is claimed, was not discovered by the first defendant's insurer until 28 November 1998, when the insurer received an employer's liability Accident Report from the first defendant.

[3] In opposition to the application the plaintiff filed an affidavit on May 27 2004. The grounds of the plaintiff's objection to the application as set out in his affidavit may be summarized as follows:-

(i) the very fact that admission of liability was made after the First defendant's insurer was in receipt of the interim report from the loss adjusters which clearly identified the Plaintiff as the 'the main contributor' to the accident;

(ii) that in the letter of 8 August 1998 from his attorney-at-law to First defendant, he was clearly identified as the driver of motor omnibus BM 400;

(iii) that subsequent to the admission of liability he was medically examined at the request of the First defendant's insurer by Mr. Authur Edghill and thereafter hereafter a quantified claim was submitted to the first defendant's insurer on his behalf;

(iv) given the length of time that has elapsed since the admission was made he would be prejudiced if the first defendant were allowed to withdraw its admission of liability.

Legal Issue

[4] The sole issue for determination is whether the first defendant ought to be allowed to withdraw the admission of liability to allow the question of liability to be determined by the court.

Background

[5] In August 1998, the plaintiff and the second defendant were both employed with the first defendant as motor omnibus drivers. The plaintiff was then 61 years and had been employed as a driver with the first defendant for approximately 13 years. The second defendant was then 47 years and had been in the employ of the first defendant for approximately 25 years.

[6] On the morning of 8 August 1998, both drivers were on duty. The plaintiff was the driver of motor omnibus, Registration Number, BM 400 owned by the first defendant and which was chartered by the Grantley Adams International Airport to transport their employees from Probyn Street, Bridgetown to the Airport in Christ Church. The second defendant was the driver assigned to motor omnibus Registration Number, BM 550, also owed by the First defendant, to operate the route 12 bus from Sam Lord's Castle, St. Philip to Bridgetown.

[7] At approximately 07:40 hrs the said morning of the 8 August 1998, a collision occurred on Pegwell Main Road, Christ Church between the two motor omnibuses BM 400 and BM 550. As a result of this collision both buses sustained extensive damage and the first and second defendant together with a number of passengers suffered personal injuries.

[8] The second defendant and the passengers of the motor omnibuses were given medical attention at either the Oistins Polyclinic or the Queen Elizabeth Hospital and were discharged the same day. The plaintiff, however, sustained severe leg injuries and had to be hospitalized for some length of time in Ward B5 of the Queen Elizabeth Hospital.

[9] On 26 August 1998, at the request of the defendant's insurer a preliminary report on liability in respect of the collision was prepared by D C Craig & Associates Ltd, Loss Adjusters and Surveyors. This report was received by the insurer on the 28 August 1998. The findings of this report were based on the investigation carried out at the locus by personnel of D C Craig & Associates Ltd, interviews with the investigating police officers, passengers and the omnibus drivers involved in the accident.

[10] The preliminary report concluded that "the plaintiff was the main contributor to the accident."

[11] By a letter dated 21 October 1998, Mr. Ralph Thorne Attorney-at -law for the plaintiff wrote a letter to the first defendant's, General Manager, which was copied to its insurer, requesting details as to its position on the first and second defendant's liability with respect to the injury sustained by the plaintiff in the collision.

[12] On 10 November 1998, the first defendant's insurer wrote the plaintiff's attorney at law admitting the defendants' liability and requesting the plaintiff to undergo a medial examination by the insurer's physician and have a medical report prepared by the said physician at the insurer's expense.

[13] By letter dated 27 January 2000, the first defendant's insurer wrote to Mr. Thorne informing him of the particulars of the appointment arranged for the plaintiff with the medical physician, Mr. Edghill.

[14] On 22 February 2000, the plaintiff was examined by Mr. Edghill and a copy of the medical report prepared by Mr. Edghill was forwarded to the plaintiff's then attorney-at-law Mr. Erskine Holmes with a request for the submission of a quantified claim.

[15] By letter dated 9 April 2001, Mr. Holmes submitted a quantified claim to the first defendant's insurer. No settlement on the quantified claim submitted on behalf of the plaintiff to the first defendant's insurers was ever attained and on 2 August 2001 proceedings were instituted by writ against the first and second defendants.

[16] On the 27 September 2001, a defence was filed by attorney-at law for the first and second defendants, Mr. Leslie

Haynes, Q.C., admitting the accident but denying liability on the part of the defendants. The defence raised contributory negligence on the part of the plaintiff with respect to the injury sustained by him as a result of the collision.

[17] It was on the filing of the defence approximately two years and ten months after the admission of liability that the plaintiff learnt for the first time that the defendants had changed their minds and were now contesting liability. A further period of one year and six months was to elapse before the defendants filed their application seeking to withdraw the earlier admission of liability.

The Law

[18] Counsel for the defendants referred the court to ***Order 27 Rule 3 of the Rules of the Supreme Court ("the 1982 Rules")*** as specifically vesting in the Court power to allow a party to resile from an admission previously made by that party. However, this court considers ***Rules 1 and 2*** of ***Order 27*** as the applicable rules***.***

[19] ***Rule 1*** reads as follows:

> "Without Prejudice to Order 18, rule 13, a party to a cause or matter may give notice by his pleadings ***or otherwise in writing*** that he admits the truth of the whole or any part of the case of any other party." (Emphasis added).

It is not in dispute that the letter dated 10 November 1998, written by the first defendant's insurer to the plaintiff's Attorney- at- law admitting the defendants' liability represents such an admission.

[20] ***Rule 2 of Order 27*** provides that:

> "An admission made in compliance with a notice under this rule shall not be used against the party by whom it was made in any cause or matter other than the cause or matter for the purpose of which it was made or in favour of any person other than the person by whom the notice was given, ***and the Court may at any time allow a party to amend or withdraw an admission so made by him on such terms as may be just."***(Emphasis added).

[21] Under this rule the court is expressly vested with a discretionary power to allow a party at any time to amend or withdraw an admission on such terms as may be just. That power, it seems to me, is very wide the only limit on the exercise thereof being that the terms for allowing such amendment or withdrawal be just. Although this rule does not contain the words " or otherwise in writing" found in ***Rule 1*** I consider that the omission does not take an admission made "otherwise in writing" as in the present case outside the scope of ***Rule 2.***

[22] Counsel for the plaintiff has preferred to found his application under ***Order 27 Rule 3*** relying upon the case of ***Gale v Superdrug Stores Plc*** [***1996] 3 All ER at 468*** in which the fact situation, except for the interim payment, very closely approximates the facts now before the Court.

Order 27 Rule 3 provides that:

> "Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment or make such order on the application as it thinks just."

[23] In ***Gale*** the application was brought under the provisions of ***Order 27 Rule 3*** of the U.K Rules of the Supreme Court which are identical to the 1982 Rules. It was common ground between counsel in ***Gale*** that the discretion conferred by that rule was wide enough to allow the court to entertain an application by the defendant to resile from his application by amendment if it was made in a pleading or by withdrawal if it was made in correspondence. As a consequence the issue of the correct procedure was not determined by the court, but rather the court directed its attention to the principles on which such leave may be granted or refused.

[24] However, the provisions of ***Order 27 Rule 2*** are clear and unambiguous. In my judgment there can be no good reason to found this application on a rule clearly formulated to allow an application to the court for judgment or an order on admission made in the pleadings or otherwise rather than to found it within the ambit of a rule expressly formulated to allow withdrawal of an admission. In this regard it must be noted that Counsel for the plaintiff made no submissions as to the procedure adopted by the defendants, relying as he did on the law of estoppel.

[25] As in ***Gale*** the issue for consideration is, what are the applicable principles to be applied in determining whether to grant the application. While I hold that the application ought properly to have been brought under ***Order 27 Rule 2***, I nonetheless accept that the applicable principles are those set out in ***Gale***.

[26] In that case the Court of Appeal by a majority decision held that in determining whether to allow a defendant to resile from an admission of liability, it was not sufficient for the court to presume prejudice to the plaintiff; the court's discretion was a general one in which all the circumstances of the case should be taken into account and a balance struck between the prejudice suffered by each side if the admission were allowed to be withdrawn. In particular, the party resisting the retraction of an admission would have to produce clear and cogent evidence of prejudice before the court could be persuaded to restrain the privilege which every litigant enjoys, of freedom to change his mind.

[27] Waithe LJ. observed:

> "a party withdrawing an admission is to be regarded in a favourable light. Excuse (or the lack of it) is not entitled in my judgment, to any particular emphasis; it is just part of the overall picture and will carry no more than the particular circumstances required." (See page 476 letter E)

[28] Counsel for the defendants contended that the plaintiff's affidavit filed on the 27 September 2001 does not disclose that the plaintiff has suffered any prejudice within the meaning of the term as defined by the ***Shorter Oxford English Dictionary 5 edn Vol. 2 p 2324***

> "as harm or injury to a person or thing that may result
>
> from a judgment or action in which his or her rights
>
> are disregarded;"

or as defined in ***Halsbury's Laws of England 4th edn Reissue Vol 9(1) at para 413 n.4,*** where it was stated that,

> "… to 'prejudice' something or someone is to say
> or do that which is detrimental or injurious to the
> interest of that thing or person."

[29] Counsel for the plaintiff contended that on the contrary, the plaintiff's affidavit in paragraphs 14 to 17 discloses substantial prejudice to the plaintiff. Such prejudice was to be found in the following factors:

(i) in the substantial change in the material and financial conditions of the plaintiff, brought about by his retirement in November 2001 leaving him dependent on his pension and financial assistance from his daughter for payment of on going medical treatment;

(ii) due to his age and injuries he is no longer able to find employment and has exhausted most of his savings on medical treatment and medication;

(iii) the payment of legal costs in the action is more onerous than it would have been if the matter had been pursued prior to his retirement;

(iv) the cost of the pursuit of a trial forces him to seek a loan for which, given his age and current employment status ,he would have great difficulty in qualifying , and;

(v) the lapse of time since the admission was given in November 1998 might render the evidence not as cogent as it would have been as the memories of the witnesses in relation to the accident may not now be as clear and sharp as they were immediately after the event.

[30] This court does not consider the plaintiff's retirement as a factor prejudicial to the plaintiff. The retirement was imminent and inevitable as at the accident the plaintiff was 61 years and had only four more years of service with the first defendant. Nor does the plaintiff's age, his state of health or depleted savings constitute such prejudice as to avoid a retraction of the admission.

[31] Indeed all the factors relied on as prejudice by the plaintiff could more often than not be regarded as incidental to the process of litigation. As Millet LJ observed in ***Gale at page 477***,

> "Litigation is slow, cumbersome and expensive,
> beset by technicalities and expenses. … But the
> process is a difficult one which is often
> frustrated by the overriding need to ensure that
> justice is not sacrificed. It is easy to disperse

> injustice quickly and cheaply, but it is better to
> do justice even if it takes a little longer and cost
> a little more.
>
> The administration of justice is a human activity
> and accordingly cannot be immune from error.
> When a litigant or his adviser makes a mistake,
> Justice requires that he be allowed to put it right,
> even if this causes delay and expense, provided
> that it can be done without injustice to the other party."

[32] Moreover, it is clear from ***Gale*** that the court in exercising its discretion should have before it some specific matter which would render it more difficult for the plaintiff to prosecute a claim in liability than it would have been if the admission had never been made. (See page 476 at Letter G) In this regard the plaintiff points to the likelihood of failing memories and the effect thereof on the cogency of evidence, so many years after the accident. This is always a factor to be weighed on the prejudicial scale. It has not been suggested that the witnesses or the investigating police officers are unavailable to give evidence at the trial. Further, there is also the report of D. C. Craig and Associates Ltd and the statements taken from the witnesses which should assist in refreshing the memory of witnesses.

[33] I consider that in this case the defendant would suffer greater prejudice if denied the application to withdraw the admission. The preliminary report on liability in respect of the collision prepared by D.C. Craig & Associates Ltd, concluded that the plaintiff substantially contributed to the collision on 8 August 1998. To deny the defendants the right to withdraw an admission, made in error, though not retracted promptly, would deprive the defendants, on the one hand, of an opportunity to establish the alleged liability of the plaintiff in the accident and on the other hand, give the plaintiff the benefit of compensation to which he might otherwise not be entitled.

[34] In response, Counsel for the plaintiff submitted that the first defendant is estopped from retracting its admission, the plaintiff having acted upon the representation made to him that liability was accepted and thereby altered his position to his prejudice. For the law relating to estoppel, Counsel referred the court to ***Halsbury's Laws of England 4th edn. para 955***. Counsel also cited the case of ***Wendy Newton v The Transport Board (Civil Action No. 2297 of 2001) unreported*** a decision of Walrond J (Ag.) in support of his contention that the defendants are estopped from withdrawing the admission of liability.

[35] The case of ***Newton,*** which the court has been informed is presently on appeal, can however be distinguished from the case before the Court. In ***Newton*** the plaintiff sought an order that the defendant was estopped from relying on the provisions of section 3 of the Limitation (Public Authorities) Act cap 206 ("the Limitation Act") and for leave to continue her action on the question of quantum only as liability had earlier been admitted by the defendant. In ***Newton*** the plaintiff's failure to institute proceedings within the limitation period was due to her reliance on an admission made to her by the defendant as contained in a "without prejudice letter", and the ongoing discussions and meeting between the parties which proceeded on a continued basis of assumed liability on the part of the defendants.

[36] In ***Newton*** clearly there would have been prejudice to the plaintiff if the defendant were allowed to retract its admission of liability because the plaintiff would have been caught by the Limitation Act and unable to pursue a claim for compensation. In this case there would be no such prejudice since the plaintiff has already filed his writ within the limitation period.

[37] Further, Counsel for the plaintiff submitted that the first defendant is estopped from relying on the mistake of its insurer in categorizing the plaintiff's claim incorrectly. Citing the case of ***Amalgamated Investments & Property Co. Ltd (in Liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER at 577*** and the observations of Denning MR at page 583 that:

> "The Bank made a mistake of its own. Everything it did followed from its own mistake. So it should put up with the consequences."

[38] On its facts ***Amalgamated Investments*** is entirely distinguishable because prejudice to the party relying on the admission was clearly established. Denning MR also remarked at page 583.

> "… In pursuance of that belief the bank embarked on a course of conduct, rearranging their portfolio of investments, releasing properties and moneys to Amalgamated which they otherwise would not have done except on the basis that the guarantee of Amalgamated covered the loan …"

In ***Commonwealth of Australia v Verwayen [1990] C.L.R. 394*** which involved both an admission of liability on pleadings and a representation that a limitation defence would not be pleaded, the Court of Appeal of Australia held by a majority decision that the appellant was not free to dispute its liability to the plaintiff because it was estopped from doing so, the equity raised by the Commonwealth's conduct being such as could only be accounted for by holding it to the assured state of affairs.

[39] On the issue of estoppel Gaudron J. had this to say:

> "The substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not require the making good of the assumption on which it is founded in every case. Even so, it may be that an assumption should be made good *unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy."* (Emphasis added)

[40] In this case there has been no unconscionable conduct on the part of the defendant or detriment to the plaintiff such as would in equity demand that the first defendant be held to its admission. On the contrary equity demands that the defendants should not be penalized for a mistaken admission of liability.

Disposal of Application

[41] For the reasons set out above, I am satisfied that it would be just in all the circumstances that the first defendant be allowed to withdraw the admission of liability and leave is so granted.

[42] The defendants shall pay to the plaintiff the costs of the application in any event certified fit for two counsel.

Elneth Kentish

Judge of the High Court.