NOVA SCOTIA COURT OF APPEAL
Citation: ***Garth v. Metro Transit***,
2006 NSCA 89

Date: 20060720
Docket: CA 259105
Registry: Halifax

Between:

Christopher Robin Garth

Appellant

v.

The Halifax Regional Municipality
carrying on business as Metro Transit

Respondent

Revised judgment:	The text of the original judgment has been corrected according to the erratum dated November 8, 2006
Judges:	Bateman, Cromwell and Oland, JJ.A.
Appeal Heard:	May 26, 2006, in Halifax, Nova Scotia
Held:	**Leave to appeal granted and appeal allowed per reasons for judgment of Cromwell, J.A.; Bateman and Oland, JJ.A. concurring.**
Counsel:	John Rafferty, Q.C., agent solicitor for the appellant Sarah L. Harris, for the appellant E. Roxanne MacLaurin, for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] Mr. Garth sued the Halifax Regional Municipality for negligence. Years later, he decided he should amend his action to add a new claim against a new defendant. By then, the new claim was barred by a limitation period. He applied in Supreme Court chambers for permission to make the amendment. Kennedy, C.J.S.C. held that he did not have authority under the **Civil Procedure Rules** to grant it and dismissed Mr. Garth's application.

[2] Mr. Garth appeals. He says, first, that the **Rules** gave the judge a discretion to grant the amendment; and second, that the judge should have granted it.

[3] In my view, the **Rules** gave the judge a discretion to grant the amendment. I, therefore, conclude that he erred in thinking that he had no authority to do so. That leaves the question of whether the amendment should be granted. I would permit the appellant to renew its amendment application in the Supreme Court rather than have us decide now whether the amendment should be granted. The proposed defendant was not given notice of the application to add it as a party. I do not think we should deal with the amendment application on its merits without giving the proposed new defendant an opportunity to be heard.

II. FACTS AND DECISION UNDER APPEAL:

[4] Mr. Garth says he was hurt when the Metro Transit bus on which he was a passenger came to a very sudden stop. He sued the municipality which operates Metro Transit. The bus driver, he claimed, had been negligent when she "slammed on" the brakes to avoid a collision with a "little red car" which suddenly turned left in front of the bus.

[5] The municipality denied negligence. The bus driver, it said, had simply reacted reasonably to the emergency situation created by the unidentified driver of the little red car. That unidentified driver, in the municipality's view, had been completely to blame.

[6] Six years after he started his lawsuit, Mr. Garth decided he should claim against the driver of the little red car as well as against the municipality. He applied to Supreme Court chambers to amend his claim accordingly. This involved making a claim against an unidentified driver. The way for him to do that was to claim against the municipality's insurer which, in turn, involved Section D of the municipality's insurance policy.

[7] Section D of the policy provides coverage for passengers – in this case, Mr. Garth – for amounts they are entitled to recover for bodily injuries resulting from an automobile accident. Where, as here, the driver alleged to be at fault is unidentified – in this case, the driver of the little red car – the amount the passenger is entitled to recover may be determined by the Supreme Court of Nova Scotia in an action brought against the insurer. That is why Mr. Garth asked to amend his claim in order to sue the municipality's insurer, Lombard Canada Limited, with respect to the alleged negligence of the unidentified driver.

[8] There were two problems with Mr. Garth's application, only one of which was recognized by the parties at the time.

[9] The first was that there is a two year limitation period in relation to Mr. Garth's claim against the unidentified driver: Section D of the Policy, s. 9(2). Mr. Garth's amendment, if granted, would effectively circumvent that limitation period. (There was no dispute before us that the amendment would relate back to when the statement of claim had been issued and that the limitation period had not expired at that time.)

[10] This limitation problem was the focus of the debate before the chambers judge. The respondent argued that, as the limitation period had expired, the **Rules** did not permit the amendment in the circumstances of this case. The judge accepted this submission and held that his hands were tied by the **Rules**. He dismissed the application to amend.

[11] The second problem – that no notice had been given to the proposed new party – was not addressed by the parties or the judge. I will return to it later in my reasons.

III. ANALYSIS:

[12] As noted earlier, there are two issues: first, did the judge err in finding that he had no discretion to grant the amendment; and, second, if so, what order ought we to make on appeal. I will address each in turn after saying a word about the standard of appellate review.

A. Standard of Review:

[13] Although this is an interlocutory appeal, the issue involves the correct interpretation of the **Civil Procedure Rules**. An error in this regard is an error in principle which should be corrected by this Court on appeal: **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143; **MacKenzie v. Kutcher** (2004), 220 N.S.R. (2d) 285; N.S.J. No. 6 (Q.L.)(C.A.).

B. Discretion to Amend:

[14] The judge found that he had no authority to grant the amendment because this case does not fall into any of the specific powers to amend in the **Civil Procedure Rules**. Respectfully, he erred in so finding. The **Rules** grant broad powers to authorize amendments and the judge had a discretion to permit the amendment which Mr. Garth asked for in this case.

[15] Both **Rules** 5.04 and 15 are relevant. **Rule** 5.04(2)(b) permits the court to order any party who ought to have been joined to be added. It provides:

> 5.04. ...
>
> (2) At any stage of a proceeding the court may, on such terms as it thinks just and either of its own motion or on application, ...
>
> (b) order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party;

[16] **Rule** 15 deals with amendments generally, and, as well, specifically addresses certain situations in which an amendment is sought after a limitation has expired. **Rules** 15.01(c) and 15.02 are most directly relevant here. They provide:

> 15.01. A party may amend any document filed by him in a proceeding, other than an order,
>
> ...
>
> (c) at any time with the leave of the court;
>
> 15.02. (1) The court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just.
>
> (2) Notwithstanding the expiry of any relevant period of limitation, the court may allow an amendment under paragraph (1),
>
> (a) to correct the name of a party, notwithstanding it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake was genuine and not misleading or such as to cause any reasonable doubt as to identity of the party intending to bring or oppose the proceeding;
>
> (b) to alter the capacity in which a party brings or opposes a proceeding if the capacity, after the amendment is made, is one in which at the date of issue of the originating notice, third party notice, or the making of the counterclaim, the party might have brought or opposed the proceeding.
>
> (3) The court may allow an amendment under paragraph (2) notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action.

[17] The problem that arises here is whether the specific language about cases involving limitation periods in **Rule** 15.02(2) and 15.02(3) limits the general language about amendments in **Rule** 15.01(c) and 15.02(1). **Rule** 15.01(c) and 15.02(1)) confer a broad, general power to amend which does not refer to the limitation period issue. However, **Rule** 15.02(2) and 15.02(3) specifically address the situation of amendments sought after a limitation period has intervened. The question before the judge was whether these specific provisions in relation to limitation periods narrow the general power to amend set out earlier in the **Rule**.

[18] The judge held they did: when faced with the intervention of a limitation period, the court may only amend if the case falls in the specific examples set out in **Rules** 15.02(2). As the judge put it:

> ... When I analyze that Section 15.02(2), I agree that the Court's power to add new defendants, after the six-year period, has got to be pursuant to Section 15.02(2). That's where the power is created. That's where it lies. So you've got to comply with that. Your scenario has to come under the permissive provisions of that, of that Rule. And I agree further that that section does not cover, does not cover this particular request to amend. The effect of this application would not be the correcting of the name of the, of the defendant. It's not under that (a), or the altering of the capacity in which the defendant appears in the action, the, the (b), it simply doesn't come under those provisions. No Rule that I am aware of allows me to add an entirely new party to an action after the six-year limitation period has expired, in an attempt to account for a possible factual circumstance.

[19] I agree with the judge that this case does not fall within any of the specific cases set out in **Rule** 15.02(2)(a) or (b). However, I do not agree with him that those specific powers limit the general amendment power set out in **Rules** 15.01 and 15.02(1).

[20] The issue the judge faced about how the specific and general powers to amend interact has a long and contentious history. Some background will be helpful.

[21] In 1887, the Court of Appeal in England decided **Weldon v. Neal** (1887), 19 Q.B.D. 394 (C.A.). It held that, where a limitation period had intervened, a party generally should not be permitted to amend a pleading to set up a new cause of action. The basis of this general rule was that a limitation period gave the defendant a vested right not to be sued. It followed that by permitting the amendment, the court was, in effect, "depriving" the defendant of the limitation defence and taking away an "existing right": at 395.

[22] While **Weldon v. Neal** was concerned with amendments to add new causes of action, the same principle was applied to amendments to add new parties: see, for example, **Hudson v. Fernyhough** (1889) 61 L.T. 722; **Mabro v. Eagle, Star and British Dominions Insurance Co.**, [1932] 1 K.B. 485. However, the rigidity of this approach and the injustice to which it led resulted in the courts developing certain categories of cases in which the amendments could be granted. So, for

example, it might be permissible to add a new cause of action where it arose out of essentially the same facts as those originally pleaded or to change the name of a party to correct a "misnomer" or alter the capacity in which a named party sued: see a review of the cases in Garry D. Watson, "Amendment of Proceedings After Limitation Periods" (1975), 53 Can. Bar Rev. 237 and Graeme Mew, *The Law of Limitations* (2nd ed., 2004) at 71 *ff.*

[23] The Rules of the Supreme Court in England were amended to address this issue. Some of the situations in which courts had granted amendments were set out in provisions similar to our **Rules** 15.02(2) and 15.03. Unfortunately, however, the impact of the new rule was controversial. That controversy bears directly on the issue we face in this case, because our Rule is modelled on the amended English rule.

[24] One line of English authority took the view that, where a limitation period had intervened, the change in the **Rule** only permitted amendments to be made in the specified circumstances: see, e.g., **Heaven v. Road and Rail Wagons, Ltd.**, [1965] 2 All E.R. 409 (Q.B.D..); **Braniff v. Holland & Hannen and Cubitts (Southern) Ltd. and Another**, [1969] 3 All E.R. 959 (C.A.). Another line of authority took a broader view that the specific provisions did not limit the general power to amend and were simply examples of situations in which amendments were permitted: **Chatsworth Investments, Ltd. v. Cussins (Contractors) Ltd.**, [1969] 1 All E.R. 143 at 143; **Sterman v. E W & W J Moore Ltd.**, [1970] 1 All E.R. 581 (C.A.), at 585; **Brickfield Properties Ltd. v. Newton**, [1971] 3 All E.R. 328 at 338.S

[25] The text of the English rule explains how this divergence of view developed. The opening words of Order 20, **Rule** 5(1) conferred a broad power to amend "... on such terms ... or otherwise as may be just ...". However, that broad power was said to be "subject to ... the following provisions of this rule ..". **Rule** 5(2) then specifically addressed amendments sought "after any relevant period of limitation current at the date of issue of the writ " had expired and referred to the specific circumstances set out in **Rules** 5(3), (4) and (5), that is, to amendments to correct a name, to alter the capacity of a party and to substitute a new cause of action if it arises out of the same (or substantially the same) facts as the original claim. A reading of the text of Order 20, **Rule 5** leaves one uncertain as to whether the specific provisions relating to amendments after a limitation period

has expired qualify or limit the general power to amend set out in **Rule** 5(1). (For convenience, I have set out the full text of RSC Order 20 Rule 5 in appendix A).

[26] The Nova Scotia rule is modelled on the English one, but with subtle, although important, changes of wording. **Rule** 15.02 sets out a broad power of amendment, but unlike the English rule, this broad power is not subject to the more specific subsequent provisions. This difference in wording seems to me to put to rest the controversy which arose under the English rule. On its plain reading, our **Rule** 15.02(1) does not contain any limit or qualification on the court's broad power to "grant an amendment ... at any time, in such manner, and on such terms as it thinks just."

[27] In any case, our Court has followed the line of authority in England which took a broad approach to the interpretation of the English rule. In **Re Eisnor Estate** (1984), 60 N.S.R. (2d) 186 (S.C.A.D.), this Court approved the judgment of Sachs, L.J. in the English Court of Appeal in **Brickfield Properties Ltd.**, **supra**. One of the issues in **Brickfield** was whether the Court had the power to grant an amendment under Order 20, Rule 5(1) even though a limitation period had expired and the case did not fall within the specific provisions of **Rule** 5(2) - (5). Sachs, L.J., relying on **Sterman, supra**, held that it did. His reasons for doing so were quoted with approval by Jones, J.A., writing for this Court in **Eisnor** at para. 10. It is worth setting out part of the quoted passage from **Brickfield**:

> [10] In *Brickfield Properties Ltd. v. Newton*, [1971] 1 W.L.R. 862, Sachs, L.J., stated at p. 874:
>
> > Reference has already been made in this judgment to the manifest and known intention of those who framed the new Ord. 20, r. 5, to break away from the old rigid practice which derived from the decision in *Weldon v. Neal* , 19 Q.B.D. 394. It is now apposite first to cite what was said on this point in *Sterman*'s case [1970] 1 Q.B. 596 by Lord Denning MR at 604:
> >
> > > 'The new rules, it is said, have cut down the power to amend. You can only amend a writ, it is said, so as to avoid the Statute of Limitations, if the case can be brought expressly within Ord. 20, r. 5, sub-rr. (2), (3), (4) and (5): and that otherwise it is a strict

> rule of the court that no amendment can be allowed which would deprive a defendant of the benefit of the Statute of Limitations. Support for this interpretation of Ord. 20, r. 5, is given by the recent case in this court of *Braniff v. Holland & Hannen and Cubitts (Southern) Ltd.*, [1969] 1 W.L.R. 1533. But I must say that I cannot agree with it. If this restrictive interpretation were given to Ord. 20, r. 5, we should be once again allowing genuine claims to be defeated by technical defects. I think we should give full effect to the wide [sic] words of Ord. 20, r. 5(1). We should not cut them down by reference to sub-rules 5(2), (3), (4) and (5) . . .'
>
> . . .
>
> With those views I find myself respectfully in agreement.
>
> [11] While there was an issue in the *Brickfield Properties* case as to the interpretation of the English rule comparable to our r. 15, I am satisfied that the passage sets forth the object of the Rule.

(See also **Martin Construction v. Penhorn Mall** (1975), 12 N.S.R. (2d) 331 (S.C.A.D.) at para. 77 *ff.*)

[28] Both the text of our **Rule** and the **Eisnor** decision support the view that the broad power to amend conferred by **Rule** 15 is not limited by the specific instances set out in **Rule** 15.02(2) and (3). **Rule** 15.02(2) and 15.02(3) preserve the various situations in which the courts had been prepared to grant amendments after a limitation expired, while 15.02(1) made it clear that the court had an overriding discretion to amend in all situations.

[29] This interpretation is also more consistent with the current approach to the effect of limitation periods. As we saw in **Weldon v. Neal**, limitation periods at one time were viewed as giving the defendant a "right" not to be sued. It followed that permitting amendments after a limitation period had expired was in effect taking away that "right". However, our Court has recognized that this approach is circular. In **Martin Construction, supra**, at para. 43, the court agreed that to argue that the defendant has an existing right which will be defeated by

amendment is to argue in a circle since there is only an existing right if the court does not use its power to amend. Another example of this approach is found in the reasons of Hallett, J. (as he then was) in **Gallant v. Oickle** (1977), 21 N.S.R. (2d) 260 (S.C.T.D.). At para. 9, he quoted with approval the English Court of Appeal in **Pontin v. Wood**, [1962] 1 All E.R. 294 to the effect that if an amendment is granted, the change relates back to the time the pleading was filed. It follows that the amendment is not depriving the defendant of any defence he or she would have had if the action had been formulated in that way in the first place. The question is not whether the expiry of the limitation period trumps the power to amend, but whether it is just to grant the amendment even though the limitation period has expired.

[30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs: **Baumhour v. Williams** (1977), 22 N.S.R. (2d) 564 (S.C.A.D.); **Stacey v. Consolidated Foods**, [1986] N.S.J. No. 356 (S.C.A.D.); **White v. Pellerine**, [1988] N.S.J. No. 191 (S.C.A.D.); **P.A. Wournell Contracting Ltd. v. Allen** (1980), 37 N.S.R. (2d) 125 (S.C.A.D.). However, the expiry of the limitation period is a strong signal of the risk of injustice to the defendant if the amendment is granted. The court must consider all relevant matters which may include, but are not limited to, the length of the delay in asserting the claim and the reasons for it, how closely the new claim is connected to the claim originally pleaded and the nature and extent of any prejudice resulting from the claim being asserted now as opposed to before the limitation period expired.

[31] I conclude that the chambers judge erred in holding that he did not have authority under **Rules** 15.01 and 15.02 to grant leave to the appellant to amend his statement of claim to add Lombard as a party and to assert the Section D cause of action against it. The judge's order dismissing the application should be set aside.

C. <u>What Order Should Be Made on Appeal?</u>

[32] Normally in a case like this one, it would be appropriate for this Court to make whatever order we think the judge ought to have made. However, I do not think we should do so in this case.

[33] A critical question in relation to any amendment is whether it will occasion any prejudice which cannot be compensated in costs. In the circumstances of this case, the issue of prejudice relates not only to the existing defendant but also – in fact, primarily – to the proposed defendant. Prejudice to the existing defendant, the municipality, was not the focus of the submissions in this case either before the chambers judge or in this Court. Counsel for the municipality conceded that there was no evidence that the proposed amendment caused it any prejudice that could not be compensated in costs. The more pertinent question is whether the addition of the proposed new defendant would prejudice its defence of the new claim. In my view, it is not appropriate in the circumstances of this case to answer that question without giving the proposed new defendant an opportunity to be heard.

[34] Lombard is the municipality's insurer. In many instances, it would be safe to assume that the insurer was conducting the municipality's defence and, therefore, would have had actual notice of the proposed amendment even though no formal notice had been given. However, in this case, the municipality is conducting the defence in-house and we have no assurance that Lombard has notice of the proposed amendment. In my view, therefore, the better course for us to follow is to permit the appellant to renew his amendment application in Supreme Court chambers, but this time with notice to both the existing and the proposed defendant.

[35] I am not suggesting that notice to a proposed defendant is necessary in all applications to add parties to an existing action. Generally speaking, it is not necessary to give notice of the intention to start an action against someone. It follows that there should generally be no obligation to give notice to a proposed new party of the intention to add that party to an existing suit. However, in this case, an important aspect of the question of whether the new party should be added is whether that party has been prejudiced in its defence by the appellant's long delay in asserting his claim against it. The proposed defendant is in the best position to provide evidence and submissions on that point and it would be unfair not to give it that opportunity.

[36] There are two main views about how the new defendant may be given that opportunity. One is to require notice of the application to amend to be given to the proposed new defendant: see, for example, **Gawthrop v. Boulton and Others**, [1978] 3 All E.R. 615 (Ch.D.) At 620; **Canadian Private Copying Collective v.**

Amico Imaging Services Inc. (2005), 42 C.P.R. (4th) 426 (F.C.); **Lee v. Rowan**, [2002] A.J. No. 335 (Q.L.) (Master); **Hartoft v. Bell**, [2005] B.C.J. No. 2663 (Q.L.)(S.C. Master), aff'd [2006] B.C.J. No. 551 (Q.L.)(S.C.); **Fullowka v. Royal Oak Mines Inc.** (1995), 42 C.P.C. (3d) 22 (N.T.S.C.). The second is not to require notice but leave the proposed defendant to challenge the order if it is made, presumably under a rule such as our **Rule** 37.13: see, for example, **Liff v. Peasley and Another**, [1980] 1 All E.R. 623 (C.A.).

[37] Although I would not want to lay down any firm rule on this point, my view is that generally the applicant should give notice to the proposed defendant (as well as the existing parties) where it is apparent from the circumstances that the proposed defendant likely has a reasonable basis to oppose being joined. Of course, whether notice should be given in a particular case is ultimately a matter for the judge from whom the amendment is sought.

[38] The issue in this case is whether we should exercise the discretion to grant or refuse the amendment in the absence of notice to Lombard. A limitation period has intervened and an important consideration relates to whether the appellant's delay has prejudiced Lombard's defence. Lombard, in my view, should receive notice in these circumstances. I would, therefore, permit the appellant to renew his amendment application in a timely way in the Supreme Court on notice to both the existing and proposed defendants.

IV. DISPOSITION:

[39] I would grant leave to appeal, allow the appeal, set aside the order of the chambers judge and order that the appellant be at liberty to renew the application to add Lombard as a party on notice to it and the existing defendant. Given the long delays evident in this matter, the renewed application shall be filed and served within 60 days of today's date and, if not filed within that time, the

application to add Lombard will be deemed to have been abandoned. I would direct that there should be no costs either before the chambers judge or in this Court and that any costs paid be refunded. The costs of the renewed application will be in the discretion of the presiding judge.

Cromwell, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.

Appendix "A"

RSC Ord 20, r 5:

(I) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his write, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the write or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.