Rocklake Enterprises Ltd. v. Timberjack Inc., 2001 ABCA 191

Date: 20010709
Docket: 9903-0378-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MR. JUSTICE WITTMANN

BETWEEN:

ROCKLAKE ENTERPRISES LTD.

Respondent
(Plaintiff)

- and -

TIMBERJACK INC. and TIMBERJACK CORPORATION, carrying on business under the name and style of TIMBERJACK CORPORATION

Appellants
(Defendants)

This is Exhibit "14" referred to in the Affidavit of DONALD H BRODER Sworn before me this 14 day of DEC A.D., 2010
A Commissioner for Oaths in and for Alberta
#0486559

APPEAL FROM THE ORDER OF THE
HONOURABLE MR. JUSTICE MURRAY
DATED THE 22ND DAY OF MARCH, A.D. 1999
FILED THE 26TH DAY OF JULY, A.D. 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CÔTÉ
CONCURRED IN BY THE HONOURABLE MR. JUSTICE WITTMANN

DISSENTING REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE BERGER

COUNSEL:

D. W. McGrath
For the Appellant

E. R. Feehan
V. R. Stevenson
For the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE CÔTÉ

A. The Issue

[1] The issue here is using the misnomer doctrine to cure a statement of claim naming the wrong plaintiff, outside the limitation period.

B. Facts and History

[2] A timber-cutting machine manufactured by the appellants caught fire and burned up, thus wasting some of its purchase price and some use. The respondent logging company had been using and maintaining the machine at the time. It told its insurer that it owned the machine, and the insurer reimbursed it. Then the insurer brought a subrogated suit in the sole name of its insured, the respondent logging company, about 15 months after the fire.

[3] Evidently the respondent had done little, if any, checking into the history of this particular machine. After some examinations for discovery, the respondent finally realized that it had never bought the machine. Lee St. Jean, son of one of its major shareholders, had bought the machine, and had merely orally leased it to the respondent logging company. The son did not even get the lease payments, which went to the bank financing the purchase of the machine.

[4] By the time the respondent discovered or recalled this, the limitation period had long passed. The respondent moved to cure the misstatement in its statement of claim almost four years after the fire. That notice of motion does not seek any change to the body of the statement of claim, merely "adding or substituting Lee St. Jean as a Plaintiff in this action".

[5] After reading affidavits and cross-examination upon them, the chambers judge gave written reasons relying upon the misnomer doctrine. His formal order retroactively "amended[s] the Plaintiff in the style of cause in this action from 'Rocklake Enterprises Ltd.' to 'Lee St. Jean'". The appellant manufacturers appeal.

[6] Pending appeal, we called to both parties' attention *The Winkfield* [1902] P. 42 (C.A.), but each counsel gave us oral argument consistent with his factum.

[7] All these events arose under the *Limitation of Actions Act*, R.S.A. 1980 c. L-15. We heard no argument about its replacement statute, the *Limitations Act,* 1996 c. L-15.1. It may differ in some respects, and we say nothing about the new statute or its effects.

C. Rule 38

[8] Counsel for the respondent relies upon a ground independent of misnomer. Rule 38 governs correcting parties. Years ago, Master Funduk analyzed its various subrules in ***M.L. Rathwell & Sons Trucking v. Alforge Metals Corp.*** (1981) 31 A.R. 163, 15 Alta. L.R. (2d) 347. He held that an incorrect plaintiff can be substituted even after the limitation period has expired for at least one of the causes of action relied upon. (He said that that would not apply to substituting a defendant.)

[9] The *Rathwell* decision cited favorably Professor Watson's well-known article on the functional approach to amending pleadings after a limitation period: (1975) 53 Can. B. Rev. 237 (see p. 350 Alta. L.R.). Our Court has since held that Professor Watson's view does not represent Alberta law: ***Madill v. Alexander Consulting Corp.*** (1999) 237 A.R. 307, 176 D.L.R. (4th) 309, 329 ff. (C.A.); ***Neis v. Yancey*** (1999) 250 A.R. 19, 73 Alta. L.R. (3d) 239 (C.A.). Those cases do not confine the analytical approach to one kind of amendment (nor do they except any kind of amendment) and *Neis* involved adding or restoring parties. The *Rathwell* decision also expressly sidestepped a mass of hard-to-reconcile authority. In particular, it declined to consider the doctrine of misnomer. (See again p. 350 Alta. L.R.)

[10] ***Frank v. Min. of Indian Affairs*** (1987) 88 A.R. 241 (C.A.) was a judgment given in two different appeals. Its reference to Prof. Watson's 1975 article (in para. 42) was given in one appeal only, and on one topic only. That topic is whether a suit against "the estate of John Smith", not naming any executor or administrator, is an incurable nullity. The argument there had been that the whole suit was a nullity, so that there was nothing which the court could amend. That was the argument which the court rejected when citing the article. The whole judgment and both appeals were about suing the correct estate, but not properly naming the estate's representative. They had nothing to do with suing the wrong tortfeasor, nor with naming the wrong victim of the loss.

[11] ***Corrigan v. Fanta*** (1989) 96 A.R. 293 (C.A.) similarly was about whether a statement of claim omitting one necessary factual averment is a nullity incapable of amendment.

[12] The *Rathwell* decision suggested that substituting a plaintiff, but not otherwise changing the nature of the claim, is a special circumstance. The decision did not found that suggestion merely upon lack of prejudice. The decision pointed out that R. 38(2) expressly deals with the case of naming "the wrong person as plaintiff or, where it is doubtful whether it has been commenced in the name of the right plaintiff", whereas there is no similar express provision respecting the wrong or doubtful defendant. Since the various subrules of R. 38 seem to stem ultimately from different parts of English legislation in 1852, the distinction is intriguing. Someday we may have to pursue that in another case.

[13] On the odd facts of the ***Rathwell*** case, that discussion of the separate subrules of R. 38 was not necessary to the decision, and the result would have probably been the same without it.

[14] However, I have trouble applying that interpretation of R. 38 to amendment after the limitation period has expired. Assuming for the sake of argument (without deciding) that R. 38 gives a wider power to correct plaintiffs than to correct defendants, little should flow from that here.

[15] The problem in the present case is not that the Rules of Court lack powers to amend parties or pleadings. They have them. No modern decision on amendment suggests that there is any difficulty curing parties before the limitation expires. The problem is that there was an independent statute, the ***Limitation of Actions Act***, which restricted times to sue.

[16] Courts in Alberta and elsewhere have consistently interpreted that legislation as setting a time limit to cure parties, including substituting plaintiffs. See ***Mabro v. Eagle Star*** [1932] 1 K.B. 485, 487 (C.A.); ***Public Trustee v. Larsen*** (1964) 49 W.W.R. 416, 421 (Alta. C.A.); ***McEvoy v. Gen. Secur. Ins. Co***. (1980) 29 O.R. (2d) 461, 464, vard. by consent (1982) 38 O.R. (2d) 704 (C.A.); ***dicta*** in ***W. Hill & Son v. Tannerhill*** [1944] K.B. 472, 170 L.T. 404 (C.A.); cf. ***Hilton v. Sulton Steam Laundry*** [1945] 2 All E.R. 425 (C.A.); ***Finnegan v. Cementation Co.*** [1953] 1 Q.B. 688, 1 All E.R. 1130 (C.A.); ***dicta*** in ***Davies v. Elsby Bros.***, ***infra***, at p. 674 (All E.R.); ***Crozier v. O'Connor*** [1960] O.W.N. 352 (C.A.); ***London Police Comm. v. W. Freight Lines*** [1962] O.R. 948, 951, 34 D.L.R. (2d) 689 (C.A.); ***dicta*** in ***Chretien v. Herrman*** [1969] 2 O.R. 339, 345; ***Nfld. S.S. Co. v. Can. S.S. Lines*** [1980] 2 F.C. 134, 35 N.R. 65 (F.C.A.); ***Veasey v. McEwan*** (1983) 50 A.R. 307, 311, 4 D.L.R. (4th) 373 (C.A.); ***Newton v. Serre*** (1985) 48 O.R. (2d) 704, 14 D.L.R. (4th) 608 (C.A.); affg. and approving (1984) 45 O.R. (2d) 314, 6 D.L.R. (4th) 320. ***Public T'ee v. Larson*** and ***Veasey v. McEwan*** are binding authority in Alberta, but they seem not to have been cited in the ***Rathwell*** case. If that were not the law, the host of cases in the Supreme Court of Canada and appeal courts discussing special circumstances or misnomer would be pointless. They exist because one cannot change any party after a limitation period without special circumstances or misnomer, and they say so.

[17] The three tests of Krever J. in ***Casey v. Halton Educ. Bd.*** (1981) 33 O.R. (2d) 71, 77-8 were adopted by the County Court Judge who made the amendment in ***Newton v. Serre***. But he was reversed by Boland J. (1984) 6 D.L.R. (4th) 320 (Ont.), which reversal was approved on further appeal: (1985) 14 D.L.R. (4th) 608 (Ont. C.A.).

[18] The analytical approach adopted in Alberta is simple. One cannot sue after the limitation period. Adding a new plaintiff or a new defendant or a new cause of action to a suit after the period expires, in effect creates a new suit, so far as that new party or cause of action is concerned. Limitations legislation is intended to give repose after a certain length of time,

and adding a new plaintiff or new cause of action violates that policy almost as much as adding a new defendant.

[19] The Rules of Court do not speak about limitation periods or times to amend. They have always been reconciled with limitations legislation by presuming that the powers under the Rules are to be exercised subject to the time limits under the legislation, when those are relevant; cf. ***Nagy v. Phillips (#1)*** (1996) 187 A.R. 97, 41 Alta. L.R. (3d) 58, 64 (C.A.); ***Leesona v. Consol. Textile Mills*** [1978] 2 S.C.R. 2, 8-9, 18 N.R. 29. Furthermore, the Rules of Court are a Regulation, and were not confirmed by statute until the 1970s. Regulations cannot override statutes.

[20] Of course even Alberta's old ***Limitation of Actions Act*** expressly allowed a few narrow amendments after the time to sue expired (see s. 61). The legislation in other provinces, and Alberta's new ***Limitations Act***, expressly allow more. That is irrelevant in the present case.

[21] I will not discuss R. 39, which neither party relied upon in the present case. That is probably because it is merely ancillary to R. 38: ***Myskiw v. Wynn*** (1977) 4 A.R. 464, 469 (para. 11), 77 D.L.R. (3d) 740 (C.A.); Funduk M. in ***Bernhart v. Umisk Farms*** (1982) 40 A.R. 549, 556 (para. 31). Besides, after a limitation period expires, adding a new plaintiff but preserving the defendant's limitation defence against the new plaintiff would be a waste of everyone's time and ink. It is no wonder that the respondent plaintiff has never asked for that.

[22] Therefore, with all respect, as did the chambers judge, I find the analysis of R. 38 in the ***Rathwell*** case to be a red herring in limitations problems.

D. Special Circumstances

[23] Counsel for the respondent also suggests that where there are special circumstances, the court may allow an amendment to the parties after the limitation period has expired. That may be correct. An example might be a defendant who had clearly misled the plaintiff as to who owned or operated the thing which committed the tort, and so induced the plaintiff to sue the wrong defendant. See ***Clark v. Thos. Gaytee Studios*** [1931] 1 D.L.R. 346 (Sask. C.A.); cf. ***Medeiros v. Baaco Pizza*** (1985) 63 A.R. 340 and 396 (M.); cf. ***Chretien v. Herrman*** [1969] 2 O.R. 339 (C.A.).

[24] However, I do not find it necessary to pursue that legal question here, nor to define its precise limits.

[25] No one has suggested to us anything in the conduct of either party before or during the suit which comes close to what has been considered special circumstances in any of the decided cases on amending pleadings after a limitation period.

E. Misnomer

[26] Misnomer is often said to be an exception to the general rule barring addition or substitution of parties after the limitation period has expired. Strictly speaking, it is no exception at all. Where there is a true misnomer, the party is the same all along, and need not be changed: ***Leesona v. Consol. Textile Mills***, ***supra***, at 8 (S.C.R.). Only a mistaken version of the party's name is corrected.

[27] An example or two will help. Suppose that just before the limitation period expires, a client instructs his lawyer to start a suit. Everyone calls the client "Jim Smith", and the lawyer assumes that "Jim" is a nickname for James. So he sues in the name of James Smith. In fact, "Jim" is short for Jimson. So far as the lawyer and his client are concerned, there is no error as to persons at all, merely an error as to description. To correct it is not really to change parties.

[28] It is true that many authorities impose an objective test, asking what either a reasonable defendant or an objective bystander would think upon reading the statement of claim: ***Davies v. Elsby Bros.*** [1961] 1 W.L.R. 170, [1960] 3 All E.R. 672, 676 (C.A.), leave den. [1961] 1 W.L.R. 519 (H.L.); ***Ladouceur v. Howarth*** [1974] S.C.R. 1111, 1116, 41 D.L.R. (3d) 416; cf. ***Brochner v. MacDonald*** (1987) 83 A.R. 117. That introduces complications such as the precise relation between this rule and that in the previous two paragraphs. Luckily nothing turns on that in this case.

[29] If there is no other separate person or company as named in the pleading, that helps a great deal to decide that one has a misnomer and not the wrong party. (I am not sure that it is conclusive proof of that fact.)

[30] Counsel for the respondent also points out to us that the existence of a separate person or company with the name given is not necessarily a bar to finding misnomer, citing Pigeon J. in ***Leesona Corp. v. Consol. Textile Mills***, ***supra***, at 10 (S.C.R.). I agree with that proposition. In the example above, the client Jimson Smith might happen to have a brother or cousin named James Smith. If James had not been involved in any of the matters sued over, and no one connected thought that he had, and indeed the lawyers and the defendants had never heard of him, he would be irrelevant. His existence would not bar finding misnomer.

[31] Therefore it follows that where misnomer is suggested, it is important to characterize the error. In any event, to characterize the error as seen by the relevant person.

[32] Was the wrong entity put into the pleading? If so, and if a lawyer drafted the pleading, the wrong entity would be put there because that entity was believed to be the one injured (as described in the pleading). Lawyers know that only the person wronged can sue. For example, the information may have passed through several hands, and the lawyer may have been misinformed as to who was injured and taken to the hospital. Or misinformed as to which of

several cargo shipments was damaged by the sea. In such a case, one must truly change the party to correct the error. As said in ***Neis v. Yancey***, ***supra***, (para. 14), that is "a deliberate but misinformed decision to omit the" party in question.

[33] But if everyone knows who suffered the loss, and there is an explanation for how his or her name came to be inaccurately recited, or that is obvious, then the error may be a misnomer.

[34] In the present case, no one could think that Lee St. Jean and Rocklake Enterprises Ltd. were the same person. One is a man, the other a corporation. Nor do their names resemble each other in any way. Nor did Lee St. Jean ever own or run this lumber business. This is not a case where a sole proprietor incorporated a company with a similar name and then sold his business to it. Nor did Lee St. Jean instruct the insurance claim or the suit, or know of it. He got none of the insurance proceeds underlying the suit.

[35] Furthermore, we have considerable evidence about how the error occurred here. The respondent Rocklake, the named plaintiff, possessed the machine in question, and operated it as part of its usual business. Everyone simply assumed that the respondent therefore owned the machine, the way that it owned most of the other machines which it operated. The insurer who is the real plaintiff was similarly misled. That is clearly an error as to entities, not an error as to names. Learning later that the plaintiff whom one named did not own part or all of the goods, and that non parties did, is not a misnomer and not curable after the limitation period expired: ***Nfld. S.S. v. Can. SS. Lines*** [1980] 2 F.C. 134, 35 N.R. 65 (F.C.A.).

[36] Things might be more complicated if the defendant, the appellant manufacturer, had known all the facts, and on reading the statement of claim must immediately have seen the error, and known what it should have said. But none of that is true. The appellant manufacturer sold the machine to a dealer, which in turn resold it to Lee St. Jean (as the chambers judge finds). One order from the dealer for an optional attachment, and one for a manual, said it was "for unit sold to Lee St. Jean". Otherwise, there is no reason for the appellant to have known who the retail buyer was.

[37] Nor did inspection, warranty, or maintenance records help much, even if one were to research serial numbers. (And there is a small error in the serial number in the statement of claim.) Those records sometimes said that the customer was Rocklake, sometimes R & L Logging (a trade name of Rocklake), sometimes St. Jean, and only occasionally Lee St. Jean. Nor would the latter be very noticeable, for the boss who ran Rocklake also had the surname St. Jean. The dealer may have known who owned this machine, but there is no evidence that it told the appellant manufacturer. Still less is there any real evidence that the appellant manufacturer knew who owned it at the date of the fire.

[38] Besides, those authorities which call for an objective test and ask what the reasonable reader of the statement of claim would realize, emphasize that that must be done without further inquiry: ***Davies v. Elsby***, ***supra***, at p. 676 (All E.R.)

[39] I am not aware of any authority which lets one change a party after the limitation period expires because the other party could have conducted research which would have revealed the error. And here such research would at best have revealed doubt, especially because most of the respondent company's shareholders shared one surname.

[40] In the present case, the chambers judge thought that the respondent manufacturer would clearly have realized the error upon reading the statement of claim, given its warranty records. I cannot agree. In the first place, that is the further inquiry barred by the rule in ***Davies v. Elsby***, ***supra***. In the second place, those records contradict each other on the subject of the name of the owner. Nor am I satisfied that they are intended to tell who is the owner, as distinguished from who runs the machine and wants it serviced. The fact that Lee St. Jean was once filled in as the "address" of the owner seems to me highly ambiguous at best. A reasonable person might well think it irrelevant.

[41] It is true that Spence J. does say that lack of prejudice is important: ***Ladouceur v. Howarth*** [1974] S.C.R. 1111, 1116. However, one must read that in context. That appeal was clearly a case of misnomer. I do not read that brief passage as giving a new independent ground to cure parties after a limitation period. And our Court has more recently held that lack of prejudice is not such an independent ground to amend (though prejudice may be an independent bar to amendment): ***Neis v. Yancey***, ***supra***, at para. 31.

[42] Therefore, in my respectful view this was not a misnomer. None of the other grounds to allow a late amendment being present, the general rule bars changing or adding parties after the limitation period expires. I would allow the appeal and set aside the amendment order.

APPEAL HEARD on January 12, 2001

REASONS FILED at EDMONTON, Alberta,
this 9th day of July, 2001

_____
CÔTÉ J.A.

I concur: _____
(Authorized to sign for) WITTMANN J.A.

DISSENTING REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER

[43] This is an appeal of a chambers judge's Order allowing Rocklake Enterprises Ltd. ("Rocklake") to amend its pleadings by substituting Lee St. Jean ("St. Jean") as plaintiff in the within action, notwithstanding the expiry of the limitation period.

[44] The issue in this appeal is whether the analytical or functional approach governs the substitution of plaintiffs after the expiration of a limitation period. The question to be decided is whether the learned chambers judge erred in law in granting relief to the Respondent who brought a claim on behalf of a corporate entity mistakenly thought to be the owner of equipment damaged in a fire. The learned chambers judge relied upon Rule 38(3) of the Rules of Court and construed the error as one of misnomer. As will emerge apparent, his analysis need not have been confined to Rule 38(3). It was open to him to permit the substitution as plaintiff of the true owner under the authority of Rule 38(2). The substitution of the proper plaintiff on the basis of "special circumstances" need not be considered.

FACTS

[45] St. Jean is an employee of Rocklake, as well as the son of the two shareholders of the company. Timberjack manufactured a Skidder and sold it to Coneco, a retail supplier. Coneco in turn sold it to St. Jean on October 27, 1993. The Skidder was leased by Rocklake and used in its business until it was destroyed by fire on January 14, 1995.

[46] In April 1996, Rocklake commenced an action alleging negligent design and manufacturing against Timberjack seeking damages for loss of the Skidder and loss of its use. On September 17, 1998, counsel for Rocklake realized for the first time that the incorrect plaintiff had been named in the Amended Statement of Claim; the owner of the Skidder was actually St. Jean, not Rocklake. Coneco and Timberjack knew who purchased and owned the Skidder. On both the purchase orders issued by Coneco to Timberjack on November 1993, as well as the purchase order issued by Coneco to Timberjack on January 5, 1994, the Skidder is identified by its serial number and the following notation appears: "Stock #404 6058 - for unit sold to Lee St. John." The Timberjack Warranty System Claim Report indicates that the customer is R & L Logging whose address is in care of St. John. The Equipment Sales Agreement, Oilfield and Heavy Hauling Bill of Lading and other Coneco documentation identify the owner of the Skidder as St. John.

[47] Timberjack, the manufacturer of the Skidder, sells to retail suppliers who, in turn, sell Timberjack Skidders to the public at large. The serial number system allows Timberjack to keep track of which Skidders are sold to whom. It would not be unreasonable to expect that Timberjack, upon receipt of a statement of claim alleging negligent design and manufacture, would examine its documentation and that of the party to whom it sold the Skidder which, in the case at bar, would have revealed that Coneco and Timberjack had been dealing with St. John and/or R & L Logging. Indeed, mindful of the allegations in the statement of claim, and the factual underpinnings recited above, there would be no reason for Timberjack to have treated St. John and R & L Logging as anything but one and the same. The statement of claim recited the make, model and serial number of the Skidder (albeit clerically misstated) so as to allow Timberjack to isolate which machine was the subject matter of the action. The actual name of the owner of the machine does not have meaningful significance. Importantly, for purposes of this appeal, the chambers judge found as a fact that the respondent manufacturer would clearly have realized the error upon reading the statement of claim, given its warranty records. I cannot say that this finding is unreasonable.

[48] In February 1999, Rocklake applied to substitute St. Jean as plaintiff in place of Rocklake. By this time, the applicable limitation period for negligence had expired. The chambers judge granted the application and allowed the substitution.

ANALYSIS

[49] Part 5 of the Rules of Court deal, *inter alia*, with misjoinder of parties. Rules 38(1), 38(2) and 38(3) state the following:

> "Misjoinder of parties
>
> 38(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
>
> (2) Where an action has been commenced in the name of the wrong person as plaintiff or, where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court may, to determine the real matter in dispute, order any other person to be substituted or added as plaintiff with or without terms.
>
> (3) The Court may, either upon or without the application of any party and with or without terms order that the name of any party

> improperly joined be struck out and that any person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant."

[50] Whereas Rule 38(2) deals with the substitution of plaintiffs, the Rules of Court address the substitution of defendants in a very different fashion. Rules 39(1) and 39(2) state the following:

> "Adding defendant
>
> 39(1) Where a defendant is added or substituted the plaintiff shall, unless otherwise ordered, amend his statement of claim in such manner as the joining of the new defendant makes proper and serve the amended statement of claim upon the new defendant.
>
> (2) The new defendant shall, unless it is otherwise ordered, have the same time to deliver a statement of defence as if he had been a defendant in the first instance **and the proceedings as against him shall be deemed to have begun at the time when he was added.**" [Emphasis added]

[51] It is patently evident that the emphasized portion of Rule 39(2) preserves by its very language any limitation defence that might be available to a newly added defendant. The passage of time, pursuant to that Rule, does not operate so as to deprive the new defendant of the benefits of the *Limitations of Actions Act*. Significantly, Rule 38(2) has no comparable language. That is not to say that a limitation defence automatically evaporates with the substitution of a plaintiff. It does, however, reflect that a defendant who was served in a timely fashion and had knowledge of the cause of action alleged against him is not in the same position as a defendant who receives such notice for the first time after the limitation period has expired. Master Funduk in ***M.L. Rathwell & Sons Trucking Ltd. v. Alforge Metal Corporation Limited*** (1981), 15 Alta. L.R. (2d) 347 (MC) at pp. 350-351 put the matter this way:

> "In the application before me I am of the view it should be disposed of, if at all possible, unencumbered by a plethora of irreconcilable decisions. Attempts to classify the proposed

amendments as either a misnomer only or a change of plaintiffs would accomplish no useful purpose in view of the facts in this case.

First, a differentiation should be made between amendments which might substitute a plaintiff and amendments which might substitute a defendant. The decisions dealing with the issue should not be indiscriminately lumped together. Where a proposed amendment would have the effect of substituting a defendant, and the limitation period has gone by, there is a legitimate prejudice suffered by the substituting defendant. For the first time a claim is being advanced against him, a claim which is barred by a limitation period.

If, however, a plaintiff is substituted, any prejudice based on a limitation period is more form than substance, assuming the nature of the claim is not changed. If the claim against the defendant is still identical after the substitution there is no real prejudice.

In my view, the rules explicitly recognize a difference between substituting a plaintiff and substituting a defendant. Rule 38(2) expressly allows the court to substitute plaintiffs where an action has been commenced in the name of the wrong person as plaintiff. There is no such provision for substitution of defendants. Rule 38(3) deals with misjoinder and nonjoinder of parties, which would cover both plaintiffs and defendants. Conceivably, one could substitute defendants under R. 38(3) by striking out a defendant and adding in someone as a defendant. However, I doubt the court would interpret or apply the subrule in that fashion, that is, to substitute defendants. The fact that express provision is made for substituting plaintiffs, and no such provision is made for substituting defendants, negates using subr. (3) for substitution purposes.

In my view, the approach to be taken to a substitution of plaintiffs is that it should be allowed if (a) no limitation period has run; or (b) if a limitation period has run, the *nature* of the claim against the defendant remains the same."

[52] I respectfully agree.

[53] The fundamental facts in ***M.L. Rathwell, supra***, were not at all dissimilar to those in the case at bar. The plaintiff applied to amend the style of cause to substitute Rathwell for a corporate entity. The mistake that had been made was that the purchaser of a trailer was not the named plaintiff (the corporate entity) but, rather, Rathwell. The prejudice complained of was, as in the case at bar, that the limitation period had expired. Critical to the conclusion reached by Master Funduk was that the nature of the claims against the defendant had not changed. "The causes of action are not new, or additional, or changed. The nature of the claims remains exactly as they were." (at p. 351). In addition, the parties throughout had dealt with the substance of the claims, that is, the merits of the issues between them.

[54] Master Funduk allowed the application for substitution of plaintiffs. In doing do, he added (at p. 352):

> "Again, I do not believe the defendant is prejudiced. A cause of action has been raised, it remains the same and the merits of that claim have been dealt with as to substance by the parties. Only the name of one of the players has changed. It is still the same ball game."

[55] The decision of ***M.L. Rathwell, supra***, was considered and applied in the case of ***Timberland Forest Products Ltd. v. 535959 Alberta Limited et al.*** [1998] unreported, Action Number 9709 00306 (Alta. QB). Mr. Justice Marshall of the Alberta Court of Queen's Bench observed:

> "It appears to be significant that Rule 38(2) applies to plaintiffs and most of the decisions refusing amendments deal with defendants. A defendant is in a different position after a limitation has arisen since it then faces a claim for the first time. There is no rule so free in permitting substitution of defendants as Rule 38(2) for plaintiffs."

Later, he held:

> I conclude, after considering all these matters, that the amendment should be allowed. It is not seriously contended that a Houle Company performed logging work. A claim was lodged and the Applicant is not attempting to set up a new cause of action. The other parties have always been aware of the claim because Houle & Sons filed it in a timely fashion. The nature of the claim has not changed. Within Rule 38(2), I believe the real

> matter in dispute should be determined so the amendment should follow."

[56] Relying upon ***Nagy v. Phillips*** (1996), 41 Alta. L.R. (3d) 58 (C.A.), the Appellants contend that the issue of prejudice does not arise until it is first concluded that correction is warranted on the basis of misnomer. With that in mind, the Appellants submit that Murray, J. put the cart before the horse. The argument is that consideration of prejudice is irrelevant if misnomer is not engaged. Reliance is also placed upon ***Madill v. Alexander Consulting Group Ltd.*** (1999), 176 D.L.R. (4th) 309 (Alta. C.A.) for the proposition that the functional approach to the amendment of pleadings after the expiry of a limitation period has been rejected by this Court.

[57] I have had the advantage of reading in draft form the Reasons for Judgment of my colleague. Citing Professor Watson's well-known article on the functional approach to amending pleadings after a limitation period, Côté, J.A. states: "Our Court has since held that Professor Watson's view does not represent Alberta law." My colleague refers to ***Madill v. Alexander Consulting Corp.***, ***supra***, and ***Neis v. Yancey*** (1999) 250 A.R. 19, 73 Alta. L.R. (3d) 239 (C.A.). He states "Those cases do not confine the analytical approach to one kind of amendment (nor do they except any kind of amendment) and ***Neis*** involved adding or restoring parties." Later in his reasons he adds: "Courts in Alberta and elsewhere have **consistently** interpreted that legislation [***Limitation of Actions Act***] as setting a time limit to cure parties, including substituting plaintiffs." [emphasis added] I respectfully disagree.

[58] A unanimous five person panel of the Alberta Court of Appeal in ***Frank v. King Estate*** (1988), 56 Alta. L.R. (2d) 289 endorsed the functional approach to the amendment of pleadings. Stevenson, J.A. stated at (pp. 300-301):

> "It is, in my view, in keeping with current legislation and the principle that ought to be applied, that the court, in deciding whether to add or substitute a party to an action, ought not concern itself with whether the action is a 'nullity', but whether the amendment results in prejudice, bearing in mind express limitation periods and the principles behind them. Has the proper defendant, the personal representative, been misled or substantially prejudiced by the amendment? This is a test I take from the article by Professor Watson, 'The Amendment of Proceedings after the Expiry of Limitation Periods' (1975), 53 Can. Bar Rev. 237 at 266 and 267. His approach is also approved by Krever J., as he then was, in *Casey v. Halton Bd. of Educ.* (1981), 33 O.R. (2d) 71, 23 C.P.C. 24, 123 D.L.R. (3d) 402 (H.C.). It is also adopted, in substance, in the Report for

> Discussion No. 4, 'Limitations,' of the Institute of Law Research and Reform, 1986, c. 5."

[59] Stevenson, J.A. later had occasion to comment on the decision of the Court in ***Frank v. King Estate***, ***supra***, when called upon to decide the case of ***Corrigan v. Fanta (Alta. C.A.)*** (1989), 96 A.R. 293. Expressing an inclination to reconsider the old rule in ***Weldon v. Neil*** (1887), 19 Q.B.D. 393, and questioning whether the analytical approach adopted in that case was still good law in Alberta, he asked rhetorically whether it should be replaced by "**the functional approach which this court applied** in ***Frank v. King Estate***...." [emphasis added]

[60] Moreover, the cases cited by the Appellants do not address the substitution of plaintiffs under the authority of Rule 38(2). By way of illustration, ***Neis v. Yancey***, ***supra***, was an appeal concerning the appropriate test to set aside a discontinuance of action which has the effect of adding a defendant after the limitation period has expired. The Court noted that the effect of the withdrawal of the discontinuance would rejoin the Appellant as a defendant "with respect to the new head of damages for personal injury arising from the same cause of action, **of which she had no notice** within the limitation period." [emphasis added] Similarly, ***Madill v. Alexander Consulting Corp.***, ***supra***, related to the addition of a new cause of action after the limitation period.

[61] In ***McEvoy et al. v. General Security Insurance Co. of Canada et al.*** (1981), 29 O.R. (2d) 461, cited by my colleague, Holland, J. took great pains to emphasize that in that case there was no mistake concerning the choice of plaintiffs. Holland, J. stated (at p. 464):

> "... I am asked to permit the adding of plaintiffs **who have a quite separate cause** of action by reason of the mortgage clauses attached to the policies and **who had no intention of suing prior to the expiration of the limitation period**;..."
>
> [Emphasis added]

[62] ***Re Palermo Bakery Ltd. and Dominion of Canada General Ins. Co. et al.*** (1976), 12 O.R. (3d) 50 is specifically referred to by Holland, J. in ***McEvoy***, ***supra***. Re ***Palermo Bakery Ltd.*** was an action for loss caused to a building and contents which was commenced only in the name of the owner of the contents. An amendment was permitted to add the owner of the building despite the expiration of the limitation period.

[63] ***Balfour Guthrie (Canada) Ltd. v. Victoria Shipping Co. Inc. et al*** (1978), 91 D.L.R. (3d) 88, 13 C.P.C. 21 is also referred to by Holland, J. in ***McEvoy***, ***supra***. In ***Balfour Guthrie***, the owner of goods was added as party plaintiff after the expiration of the limitation period where goods had been damaged in transit. Holland, J. noted that: "It does not appear

from the report why the owner had not been originally added but it does appear that the defendant had notice of the claim within the limitation period."

[64] My colleague also cites ***Newton v. Serre*** (1984), 6 D.L.R. (4th) 320. Boland, J. reversed the County Court judge who permitted amendment after the expiry of the limitation period. In doing so, Boland, J. observed that there was no suggestion that the defendant was made aware through the pleadings, correspondence or the discovery process of the possibility of a claim prior to the expiry of the limitation period. The defendant had not been put on notice as to the case he had to meet. The County Court judge had adopted the three tests for amendment outlined by Krever, J. in ***Casey et al v. Halton Board of Education*** (1981), 33 O.R. (2d) 71, to wit:

> "Have all the facts relating to the alleged tort been pleaded before the expiration of the limitation period so that the defendant has been put on notice as to the case he must defend? Apart from the loss of the limitation defence will there be any actual prejudice to the defendant if the amendment is allowed? Finally, does the amendment really set up a new cause of action or is what is involved merely a new head of damages under the existing cause of action?"

He was not reversed on that basis. Boland, J., relying upon ***Hartwick v. MacIntyre et al.*** (1982), D.L.R. (3d) 333, held that the claims of the statutory beneficiaries under the ***Family Law Reform Act*** must be asserted in an action commenced directly by at least one of them. The Ontario Court of Appeal said only that Boland, J. was correct in her interpretation and application of ***Hardwick v. MacIntyre et al.***

[65] In ***London Police Commissioners v. W. Freight Lines***, [1962] O.R. 948, a Solicitor's affidavit supporting the motion to amend made clear that the Board of Commissioners of Police rather than the Corporation of Township of London had been deliberately chosen as plaintiff. MacKay, J.A., in dissent, emphasized that this was not a case of a plaintiff attempting to re-frame his case by setting up a different cause of action. Indeed, that is precisely the basis upon which the Ontario Court of Appeal in ***Cretien v. Herrman***, [1969] 2 O.R. 339 distinguished ***London Police Commissioners*** from ***Durham v. West***, [1959] O.W.N. 169. The defendants were at all times fully aware of the nature of the claim being made against them and were not misled or prejudiced in their defence by the mis-naming of the owner of the motor vehicle they were alleged to have damaged.

[66] The English case of ***Robinson et al v. Unicos Property Corp. Ltd.***, [1962] 2 All E.R. 24 made clear that the rule that amendments will not be permitted if a statute of limitations has intervened does not apply generally to all amendments. That decision, I respectfully suggest,

was in direct response to the understandable reluctance on the part of the Law Lords in ***Finnegan v. Cementation Co.***, [1953] 1 All. E.R. 1130 to rigidly apply a technical rule that had the effect of denying justice in the cause. As Singleton, L.J. put it (mindful of the earlier decision of the Court in ***Hilton v. Sutton Steam Laundry***, [1945] 2 All E.R. 425) at p. 1136:

> "I would add that **these technicalities are a blot on the administration of the law**, and everyone except the successful party dislikes them. They decrease in numbers as the years go on, and I wish that I could see a way round this one."
>
> [Emphasis added]

[67] It is precisely that concern that has nurtured the development of the law in Alberta. My colleague says that ***Public Trustee v. Larsen*** (1964), 49 W.W.R. 416 and ***Veasey v. McEwan*** (1983), 50 A.R. 307 are "binding authority in Alberta." I respectfully disagree. ***Public Trustee v. Larsen***, decided on October 14, 1964, held that the appointment by order of the public trustee as administrator *ad litem* of the estate of a deceased person does not authorize him to commence an action, as plaintiff, on behalf of the estate of the deceased. The court held that the action was required to be brought "by and in the name of the executor or administrator of the person deceased." Until a grant of administration has been obtained, there is no status to sue. In such circumstances, the Court held that "there can be no question of amending the statement of claim by substituting the proper party as plaintiff." The decision can be distinguished on the basis that there can be no mistake as to the naming of the plaintiff where the status to sue was non-existent at the time that the limitation period expired. ***Veasey v. McEwan*** was decided in 1983. An order had been granted to join the administrator of the ***Motor Vehicle Accident Claims Act*** as a nominal defendant at a time when the cause of action against him was statute barred. ***Veasey v. McEwan*** did not involve the substitution of plaintiffs. In addition, as explained earlier in this judgment, the more recent five panel decision of the Alberta Court of Appeal in ***Frank v. King Estate***, ***supra***, decided in 1987 is, on application of the doctrine of *stare decisis*, the "binding authority in Alberta." The functional approach governs the substitution of a plaintiff erroneously named.

[68] It is true that Alberta's old ***Limitation of Actions Act*** expressly allowed, as my colleague notes, "... a few narrow amendments after the time to sue expired (see s. 61)." Those exceptions and the decision of this Court in ***Frank v. King Estate***, were, in part, the foundation and justification for the functional approach now codified by the Legislature of Alberta in the new ***Limitations Act*** proclaimed in force on March 1, 1999.

[69] All of the foregoing, in my opinion, is consistent with the view taken by the Supreme Court of Canada in ***Ladouceur v. Howarth*** (1974) 41 D.L.R. (3d) 416 and ***Witco Chemical Co. Canada Ltd. v. Town of Oakville et al.*** (1974) 43 D.L.R. (3d) 413. In both cases, Spence, J. endorsed the functional approach. In doing so in ***Witco Chemical***, he relied in part upon

Rule 136(1) of the then Rules of Practice of the Supreme Court of Ontario which provided that:

> "The court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added or, where an action has through a *bona fide* mistake been commenced in the name of the wrong person as plaintiff or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may order any person to be substituted or added as plaintiff."

[70] It will be noted that Rule 136(1) is not unlike Alberta Rule 38.

[71] In ***Witco Chemical***, counsel for the plaintiff issued a writ in the name of Witco Chemical Co. Canada Limited. The associate dealing with the claim was, in the words of Spence, J., "blissfully unaware" that an amalgamation agreement had been entered into whereby Witco Chemical was subsumed under the name of a separate entity, "Argus Chemical Canada Limited." The mistake was discovered weeks after the limitation period had expired. In allowing the substitution of the correct plaintiff, the Supreme Court noted that the solicitor exercised no choice as between two possible plaintiffs, and had issued the writ in the name of the only plaintiff who he knew. On behalf of a unanimous Court, Spence, J. concluded (at p. 417):

> "Therefore, whether or not the action had been commenced in the name of the wrong person as plaintiff, it was certainly doubtful whether it had been commenced in the name of the right plaintiff. I am of the opinion, therefore, that if there was a *bona fide* mistake within the words of Rule 136, an order should have been made,..."

[72] Those authorities cited by the Appellants in support of the proposition that the issue of prejudice is not engaged until it is first decided that amendment is justified on the basis of misnomer, need not be addressed on this appeal. That is because the relevant inquiry in adjudicating upon a motion brought pursuant to Rules 39(1) and 39(2) is, as explained *supra*, very different from that which must be considered where the applicant invokes Rule 38(2) to substitute a plaintiff. Rule 38(2), in my opinion, necessarily contemplates a functional approach that takes into account, *inter alia*, the issue of prejudice to the defendants. That described by Master Funduk as "a plethora of irreconcilable decisions" on the subject of misnomer does not inform the

resolution of the issue where the Order sought is to substitute a plaintiff. It is not a condition precedent to a consideration of prejudice that the Court first be persuaded that correction on the basis of misnomer is warranted.

[73] In the case at bar, prejudice is not made out. It is still "the same ball game". The underlying nature of the claim, namely, that the destruction of the equipment by fire was caused by the negligent design and manufacture of the Skidder by Timberjack, remains the same. No new causes of action are added. No new facts are alleged. No new head of damage is proffered. (The claim for loss of use would remain to be proven in reliance upon the lease of the Skidder by St. Jean to Rockwell.) Where, as here, the defendants (Appellants) received timely notice of the claim and had ample time and early opportunity to investigate the fire and prepare their defence, and where, as here, the nature of the claim and the substance of the allegations against the Appellants remain identical even after the amendment, any prejudice is more form than substance.

[74] For these reasons, I would dismiss the appeal.

APPEAL HEARD on JANUARY 12, 2001

REASONS FILED at EDMONTON, Alberta,
this 9th day of JULY, 2001

BERGER, J.A.

Action No. 1003-16312

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICAL DISTRICT OF EDMONTON

BETWEEN:

DONALD BRODER

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Defendant

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