Knott v JN Mousellis Civil Contractors Pty Ltd & Anor
[2016] NTSC 59

PARTIES:	JOHN KNOTT v JN MOUSELLIS CIVIL CONTRACTORS PTY LTD AND BMD HOLDINGS PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	104 of 2014 (21447472)
DELIVERED:	22 November 2016
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Substitution of a party as a defendant – Alternate powers in the Supreme Court Rules to substitute parties – Effect of limitation defences – Test for the correct application of rule 36.01(4) – Meaning of "mistake in the name of a party" in rule 36.01(4) – Rule 36.01(4) is not limited to misnomers or misdescriptions – A mistake as to the identity of a party according to the characteristics or description of the party satisfies the requirements of rule 36.01(4) – Leave granted.

Supreme Court Rules, rr 9.06, 9.11(3), 36.01(4) and (5).

Creedon v Measey Investments Pty Ltd (1990) 100 FLR 42;
Mannin Pty Ltd v Metal Roofing And Cladding Pty Ltd Court of Appeal, Northern Territory, Martin CJ, Kearney and Priestley JJ, 26 September 1997;
Her Majesty's Attorney General for England v Sorati [1969] VR 88;
Bridge Shipping Pty Ltd v Grand Shipping S.A. & Anor (1991) 173 CLR 231;
The "Al Tawwab" [1991] 1 Lloyd's Rep 201;
J Robertson & Co Ltd v Ferguson Transformers Pty Ltd (1970) 44 ALJR 441;

REPRESENTATION:

Counsel:

Plaintiff:	Mr Connolly
First Defendant:	Not represented
Second Defendant:	Mr Roper

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	HWL Ebsworth Lawyers
Second Defendant:	Hunt & Hunt Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Knott v JN Mousellis Civil Contractors Pty Ltd & Anor
[2016] NTSC 59

No. 104 of 2014 (21447472)

BETWEEN:

JOHN KNOTT
Plaintiff

AND:

JN MOUSELLIS CIVIL CONTRACTORS PTY LTD First Defendant

AND:

BMD HOLDINGS PTY LTD
Second Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 22 November 2016)

[1] The Plaintiff has applied by Interlocutory Summons for an order pursuant to rule 36.01(4) of the *Supreme Court Rules* ("the SCR") to amend his Writ and Statement of Claim. The amendment sought to be made is to correct the name of the Second Defendant. The currently named Second Defendant is "BMD Holdings Pty Ltd" and the correction sought to be made is to change the name to "BMD Constructions Pty Ltd".

[2] The First Defendant chose not to be heard on the application. The Second Defendant and the party proposed to be joined were represented by Mr Roper of counsel. Both the Second Defendant and the party proposed to be joined left the issue of the amendment to the Court and neither consented to nor opposed the application but made submissions to assist the Court in its determination.

[3] Rule 36.01 of the SCR, to the extent that it is relevant to the current application, provides as follows:

> **36.01 General**
>
> (1) For the purpose of determining the real question in controversy between the parties to a proceeding or of correcting a defect or error in a proceeding or of avoiding multiplicity of proceedings, the Court may at any stage order that a document in the proceeding be amended or that a party have leave to amend a document in the proceeding.
>
> (2)-(3) Omitted.
>
> (4) A mistake in the name of a party may be corrected under subrule (1) whether or not the effect is to substitute another person as a party.
>
> (5) Where an order to correct a mistake in the name of a party has the effect of substituting another person as a party, the proceeding shall be taken to have commenced with respect to that person on the day the proceeding commenced.
>
> (6) The Court may, notwithstanding the expiration of a relevant limitation period after the day a proceeding is commenced, make an order under subrule (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.
>
> (7)-(9) Omitted

[4] An alternate power to substitute a party in appropriate cases is rule 9.06 of the SCR. That provides:-

> **9.06 Additional, removal, substitution of party**
>
> At any stage of a proceeding the Court may order that:
>
> (a) a person who is not a proper or necessary party, whether or not he was one originally, cease to be a party;
>
> (b) any of the following persons be added as a party:
>
> (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated on; or
>
> (ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding; or
>
> (c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

[5] Rule 9.11 of the SCR relates to the substitution of a party pursuant to rule 9.06 and that is of particular relevance to the current application as the limitation period for the Plaintiff's cause of action has now expired. That rule provides:

> **9.11 Amendment of proceedings after change of party**
>
> (1)-(2) Omitted
>
> (3) Where an order is made under rule 9.06 or 9.08 adding or substituting a person as defendant:
>
> (a) the proceeding against the new defendant commences on the amendment of the filed originating process in accordance with subrule (1) or (2);
>
> (b)-(c) Omitted

[6] Rule 36.01(4) permits amendments to correct a mistake in the naming of a party and rule 9.06 applies generally to the substitution of a party. The addition or substitution of a party by amendment pursuant to 36.01(4) overcomes possible limitation issues by reason of rule 36.01(5). A limitation defence is available in the case of a substitution pursuant to rule 9.06 by reason of rule 9.11(3)(a). The usual practice where the limitation period has expired is to refuse leave as the limitation defence will be inevitably taken and would inevitably succeed. Therefore, in the ordinary course an application by the Plaintiff for leave to substitute under rule 9.06 would have been refused as it would have been futile in light of the limitation defence that is available[1]. Necessarily therefore the plaintiff applies under rule 36.01(4).

[7] The evidence on which the application is based mostly consists of the affidavit of Niall Connolly sworn 4 October 2016. Although the affidavit does not specifically say so, essentially the Plaintiff's evidence is that, inferentially at least, the Second Defendant was named as the appropriate party as that was the name which appeared on a form titled "Information To Treating Doctor". That form was apparently used as an introduction of the Plaintiff to a treating doctor. The form refers to only one company name, i.e., "BMD Holdings Pty Ltd", which is the entity currently named as the Second Defendant. However that company is part of a group. That is evident from the wording of the form at various places. At one point it states: "*We*

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1 *Creedon v Measey Investments Pty Ltd* (1990) 100 FLR 42; *Mannin Pty Ltd v Metal Roofing And Cladding Pty Ltd* Northern Territory Court of Appeal, 26 September 1997.

*would like to introduce John Knott, an *employee of/contractor to The BMD Group..*". Also: "*The BMD Group is committed to quality rehabilitation…*". Lastly the form contains the phrase "*As a responsible employer, The BMD Group is…*". This indicates that the form was used by multiple, albeit related, entities.

[8] The affidavit of Niall Connolly also annexes ASIC searches of both BMD Holdings Pty Ltd and BMD Constructions Pty Ltd. Those searches indicate that the latter is a wholly owned subsidiary of the former and that both companies have common officeholders and have the same registered office.

[9] The conclusion can be drawn from the form referred to paragraph 7 that the members of "The BMD Group" used the form. To the extent that it is relevant, it can be sufficiently inferred from the ASIC searches and the use of the word "Group" that the party proposed to be joined also used the form.

[10] The Plaintiff's evidence lacks specifics as to how the Plaintiff came to be provided with the form, whether the name or identity of the Second Defendant was adopted only because of the name appearing on that form, what other documents the Plaintiff or his solicitors had which refers to the holding company or the subsidiary company and/or indicates who the correct party is and, lastly, what enquiries were made by or on behalf the Plaintiff to ascertain the correct identity of the party. All that can be relevant to determining the nature of the mistake relied on. Whether the evidence overall is sufficient to provide for an order in favour of the Plaintiff will

depend on the approach to be taken to the application of rule 36.01(4). Needless to say, if the Plaintiff's evidence, on the proper construction of rule 36.01(4), is found to be deficient to support the order sought, that will operate against the Plaintiff.

[11] The application turns on whether the Plaintiff can legitimately utilise rule 36.01(4) as, for the reasons stated above, a substitution pursuant to rule 9.06 will necessarily be refused.

[12] The wording of rule 36.01(4) in referring to a "*mistake in the name of a party …*" is the basis for the authorities that specify that the rule applies to a mistake of identity. Put in its simplest form, a mistake may be as to identity or liability. The example given by Asche CJ in *Creedon v Measey Investments Pty Ltd*[2] ("*Creedon*") demonstrates this. He said:

> "If A sues B in the belief that B is in breach of some duty to him, and in fact the duty is not owed by B but by C then A has made a mistake; but not one that can be corrected under r 36.01(4). For A has always intended to sue B and has made no mistake in the name."[3]

[13] In *Creedon*, Asche CJ supported the test in *Her Majesty's Attorney General for England v Sorati*[4] namely:-

> "The proposed plaintiff should not be substituted unless, as from the time of service of the original proceedings, the defendant in fact did or ought reasonably to have proceeded on the basis that the actual plaintiff was in reality the plaintiff proposed to be substituted. Accordingly, for the plaintiff to justify the substitution he must establish, it appears to me, two things, first, that the name of the actual plaintiff was a misnomer or misdescription of the plaintiff proposed to be substituted and, secondly, that from the time of the

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2 (1990) 100 FLR 42
3 (1990) 100 FLR 42 at p 51.
4 [1969] VR 88.

> service of the proceedings the defendant knew or ought reasonably to have known that this was so….. The same basic principles are, I think, applicable where the application is to substitute a defendant, but the task of a plaintiff is often easier in such a case, particularly if the defendant proposed to be substituted is the person who has actually been served with the proceedings, because then that person served likely to ask the question, "Was it me that was meant?."

[14] Applying that to the current matter, it is easy to conclude that when the Writ was served on the Second Defendant, presumably at the registered office of the Second Defendant (which is also the registered office of BMD Constructions Pty Ltd, the entity proposed to be joined), the director of the Second Defendant (who is also a director of BMD Constructions Pty Ltd), would very likely have proceeded on the basis that BMD Constructions Pty Ltd was meant to be the defendant. That conclusion seems inescapable in the circumstances.

[15] The High Court considered the equivalent of rule 36.01 in the Victorian Supreme Court Rules in *Bridge Shipping Pty Ltd v Grand Shipping S.A. & Anor*[5] ("*Bridge Shipping*"). That case involved damage to goods in transit by sea. The issue arose in the context of a third party notice but that does not effect the operation of the relevant rules. The owner of the goods (Phillip Morris) sued the company it had engaged to arrange the carriage, which was the appellant Bridge Shipping. Bridge Shipping then issued a third party notice against the owner of the vessel (the respondent, Grand Shipping SA). However Grand Shipping had entered into a charter with another shipping company and therefore the charterer was the carrier. Liability in that case

5 (1991) 173 CLR 231.

attached to the carrier, not the owner. When Bridge Shipping discovered the error it sought to substitute the charterer as the third party in place of Grand Shipping SA.

[16] Bridge Shipping had not been mistaken as to who it joined as the owner. It intended to join Grand Shipping SA as it was the owner of the vessel and Bridge Shipping believed that it was also the carrier. The mistake was in thinking that the owner was also the carrier. An application pursuant to the equivalent of rule 36.01(4) of the SCR to correct the name of the third party to that of the charterer failed as the mistake was not a mistake "*in the name of the party*". This was because the party intended to be joined as a third party was the owner of the vessel albeit that Bridge Shipping incorrectly believed that the right of action lay against the owner as it was also the carrier.

[17] All members of the Court found that the error was one as to where liability lay and not an error in the name of the party. Different views however were expressed as to the extent that a mistake could be a mistake as to identity. The majority were of the view that a mistake of identity included an error of name where the intention is to sue a person with certain characteristics but an incorrect party is named. The majority concluded that rule 36.01(4) covers more than just misnomers and that it also covered errors where the plaintiff, intending to sue a person identified by a particular description, was mistaken as to the name of the person who answered that description. Although that was a "mistake", it was not a "*mistake in the name of the*

party" to which rule 36.01(4) could apply. Dawson J, in the minority, applied a more restrictive interpretation of rule 36.01(4) and was also of the view that the mistake fell outside rule 36.01(4).

[18] To demonstrate the distinction by reference to the facts in *Bridge Shipping*, McHugh J, in the majority, said that if Bridge Shipping had intended to sue the carrier but had mistakenly believed that the name of the carrier was Grand Shipping SA, rule 36.01(4) would have permitted a correction of the name[6].

[19] McHugh J said:

> "Thus, a plaintiff may make a mistake "in the name of the party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, the plaintiff may make a mistake "in the name of the party" because, although intending to sue a person whom the plaintiff knows by a particular description, e.g. the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers that description. In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person but is mistaken as to the name of that person. In the first case, the properties which identify the person are personal characteristics; in the second case, they are the properties which are of the essence of the description of that person. But for the purposes of sub-r. (4) that distinction is irrelevant. In both cases, the plaintiff was mistaken only as to the name of the person intended to be sued. There is no warrant for treating sub-r. (4) as dealing only with the case with the properties which identify the party are inherent properties. That is, there is no warrant for treating sub-r. (4) as dealing only with the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by certain inherent properties peculiar to it but whose name I mistakenly believed was X." The sub-rule applies equally to the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by reference to certain properties which are true of it and of no one else and whose name I mistakenly believed

6 (1991) 173 CLR 231 at 261-262.

> was X." In both cases, a mistake in the name of the party has occurred and can be seen to have occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else."

[20] He concluded that the test was as set out in *The "Al Tawwab"*[7] where Lloyd LJ said:

> "In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v Harris Engineering* the identity of the person intended to be sued was the plaintiff's employers. In *Evans v Charrington* it was the current landlord. In *Thistle Hotels v MacAlpine* the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise."

[21] Dawson J thought that rule 36.01(4) had a more limited application and applied only to errors in the nature of a misnomer. He was of the view that a mistake in the name of the party was not the same as a mistake in the identity of the party. He cited an example namely:-

> "In other words, one may intend to sue the landlord but be mistaken in the belief that X is the landlord. That is not to mistake the name of X, but to mistake the identity of the landlord."[8]

[22] The test he suggested was:-

> "… the question can only be resolved by asking whether, in all the circumstances, it can reasonably be said that the party whose name is sought to be amended would remain the same in all but name or

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7 [1991] 1 Lloyd's Rep 201.
8 (1991) 173 CLR 231 at p 242.

> description if the amendment were allowed. If so, then there is a misnomer or misdescription and the rule applies… If not, and the effect of the amendment would be, not to correct the name of the party, but to alter the identity of the party, then that rule does not apply."[9]

[23] The issue also arose in *Mannin Pty Ltd v Metal Roofing And Cladding Pty Ltd*[10] ("*Mannin*"), a case which involved a claim for lost profits. The proceedings named Mannin Pty Ltd on instructions from the director who erroneously instructed the solicitors that Mannin Pty Ltd was the entity which sustained the loss. Hence it was always intended to name Mannin Pty Ltd as plaintiff. The Northern Territory Court of Appeal found that there had been no error in the name of the party which could be rectified by an amendment pursuant to rule 36.01(4). The mistake was categorised as a mistake as to the legal recourse available to Mannin Pty Ltd and was not a mistake as to the name of the party. In those circumstances the solicitor did not make a mistake when naming Mannin Pty Ltd as the plaintiff and there was no evidence led as to any mistake by the client in giving those instructions.

[24] The limited nature of the Plaintiff's evidence can now be considered in the light of the authorities. Had the opinion of Dawson J represented the majority view the Plaintiff's evidence may have been insufficient to warrant a favourable order pursuant to rule 36.01(4). The lack of evidence to explain the process adopted by or on behalf of the Plaintiff in naming BMD Holdings Pty Ltd as the defendant may not have been sufficient to ascertain

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9 (1991) 173 CLR 231 at p 245.

10 Court of Appeal, Northern Territory, Martin CJ, Kearney and Priestley JJ, 26 September 1997.

whether the mistake was as to the name of the party in accordance with the views of Dawson J.

[25] However, the approach of the majority in *Bridge Shipping* is to be applied. On that basis the Statement of Claim in the current matter supports an order in favour of the Plaintiff. The claim is against the First and Second Defendants for damages for injuries suffered by the Plaintiff. It is alleged that the Plaintiff was a servant of the First Defendant (paragraph 4) and that the First Defendant contracted to supply the Second Defendant with plant and labour in respect of a certain development (paragraphs 5 and 6). It is alleged that the Plaintiff was injured while performing work as a servant of the First Defendant and under the direction of both the First and the Second defendants (paragraphs 7 and 8).

[26] Much of that is disputed on the pleadings but it is relevant for current purposes as part of the circumstances to be considered in categorising the nature of the mistake. The Plaintiff's Statement of Claim does not assert that the party proposed to be substituted (BMD Constructions Pty Ltd) was carrying out the construction works. Correctly categorising the nature of the mistake for the purposes of rule 36.01(4) in current case involves determination of the question of whether the Plaintiff intended to sue the owner of the development or the entity who contracted with First Defendant. In my view the pleadings are clear that it was intended to be the contracting party.

[27] Therefore applying *Bridge Shipping* the error is one as to the name of the party according to the nature of the characteristics of the party, notwithstanding that a different but similarly named entity will be substituted as the party as a result. The Plaintiff intended to sue the entity with which his employer had contracted. That was BMD Constructions Pty Ltd but the Plaintiff made a mistake as to the name of that entity.

[28] Accordingly there will be an order pursuant to rule 36.01(4) giving leave to the Plaintiff to amend the Writ and the Statement of Claim to correct the name of the Second Defendant to “BMD Constructions Pty Ltd”. That being a simple and straightforward amendment, the Plaintiff has seven days from the date hereof to file and serve amending documents.

[29] I will hear the parties as to as to costs and any other ancillary orders.