

SUPREME CT.

EURO FIXED INCOME V. BAKER TILLY

[2007–09 Gib LR 299]

**EURO FIXED INCOME LIMITED and GLOBAL FIXED  
INCOME LIMITED v. BAKER TILLY (GIBRALTAR)  
LIMITED, GOMEZ and MENA**

SUPREME COURT (Pitto, Ag. J.): February 12th, 2009

*Civil Procedure—parties—substitution of parties—application for substitution may be statute-barred after expiry of relevant limitation period—English principle of relating substitution back to date of original action not included in Gibraltar Limitation Act*

The claimant funds brought proceedings for breach of contract and negligence by their auditors.

The claimants had engaged a Gibraltar partnership to audit their accounts. Substantial sums of investors' money were allegedly misappropriated by the claimants' investment manager. The claimants issued proceedings on the last day of the limitation period against the first defendant—the successor entity to the Gibraltar partnership—and the second and third defendants, who were the senior partners responsible for the auditing of the claimants' financial statements, alleging that the losses were caused by their breach of contract and/or negligence. After the limitation period had expired, the claimants applied to substitute the first defendant and replace it with the Gibraltar partnership.

The claimants submitted that, in the absence of an equivalent provision in Gibraltar, the substitution of the parties should be ordered under r.19.5 of the Civil Procedure Rules as it was necessary because (a) they had been misled into thinking that the successor entity was the correct defendant; (b) it was a genuine mistake; (c) the only prejudice would be the loss of the limitation defence; (d) the intended defendant was clear in the documents; and (e) the investors should not be deprived of recovering their money.

**Held**, dismissing the application:

The claimants' application for substitution of the parties would be dismissed because it was statute-barred. While the Limitation Act did not expressly prohibit substitution, it did not contain a provision equivalent to s.35 of the English Limitation Act 1980—the principle of relation back whereby the substitution of a party was deemed to take place on the same date of the original action. This omission in the legislation must be deemed to be deliberate and would not be departed from simply to follow the English procedural rules. As the limitation period had now expired and

the date of substitution could not be related back, the application would be dismissed (para. 9; para. 12).

**Cases cited:**

- (1) *Ketteman v. Hansel Properties Ltd.*, [1987] A.C. 189; [1987] 2 W.L.R. 312; [1988] 1 All E.R. 38, referred to.
- (2) *Parsons v. George*, [2004] 1 W.L.R. 3264; [2004] 3 All E.R. 633; [2005] C.P. Rep. 3; [2004] 3 E.G.L.R. 49; [2004] EWCA Civ 912, referred to.
- (3) *Payabi v. Armstel Shipping Corp.*, [1992] Q.B. 907; [1992] 2 W.L.R. 898; [1992] 3 All E.R. 329; [1992] 2 Lloyd’s Rep. 62, *dicta* of Hobhouse, J. considered.

**Legislation construed:**

Civil Procedure Rules (S.I. 1998/3132), r.19.5: The relevant terms of this rule are set out at para. 5.

Limitation Act 1980 (c.65), s.35: The relevant terms of this section are set out at para. 8.

Supreme Court Rules (L.N. 2000/031), r.6(1): The relevant terms of this sub-rule are set out at para. 7.

**1 PITTO, Ag. J.:** Four applications were listed for hearing together:

(i) The second and third defendants applied for an order that the court has no jurisdiction over them as the claim forms were not validly served on them within the required time limits. This has been conceded by the claimants.

(ii) The claimants applied for an order that service on the second and third defendants be allowed to stand or be dispensed with. This has also been withdrawn.

(iii) The first defendant applied for an order striking out or summarily dismissing the claim against it.

(iv) The claimants applied to substitute the first defendant and replace it with KPMG (Gibraltar) Ltd. and the KPMG (Gibraltar) Partnership.

2 The claimant companies are incorporated as mutual funds under the laws of the Cayman Islands. Both claimants have been in voluntary liquidation since June 24th, 2004. The first defendant (“Baker Tilly”) is a firm of accountants registered in Gibraltar. They are, since July 1st, 2004, the successor entity to KPMG (Gibraltar) (“KPMG”) which is a partnership established under Gibraltar law. KPMG acted as the claimants’ auditors. They audited the claimants’ accounts for the year ended June 30th, 2004. The second defendant was, until July 1st, 2004, the senior

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partner in KPMG. He then became a joint senior partner of Baker Tilly. The third defendant was a partner with KPMG and the engagement audit partner in respect of the claimants' financial statements for the year ended June 30th, 2001. The claim forms were issued on the last day of the limitation period, October 24th, 2007.

3 The claimants allege that as a result of breach of contract and/or negligence by their auditors, KPMG, substantial sums of investors' money were lost. The missing money was allegedly misappropriated by Rock Financial Services Ltd. ("Rock"), the claimants' Gibraltar-based investment manager. Rock did not, as required to, hold the claimants' money in segregated accounts. Amid allegations of criminal activity and an investigation by the Royal Gibraltar Police, the Supreme Court of Gibraltar, on July 22nd, 2003, ordered that Rock be wound up. Substantial sums have been lost belonging to many small investors.

4 The claimants allege that (a) they were misled by public statements, made at the time of and announcing the merger of KPMG with Baker Tilly, into thinking that the new entity would, in the circumstances, be the correct defendant; (b) it was a genuine mistake, making substitution of the parties a necessity; (c) no one was misled or suffered prejudice—the only prejudice would be the loss of the limitation defence; and (d) it was possible to discover who the intended defendant was from the documents, namely those responsible for auditing their accounts. Further, they argue that it is necessary to substitute the parties. The claimants submit they have a strong case and that the small investors who are the participating shareholders of the claimants should not be deprived of the opportunity of recovering their money.

5 The claimants rely on r.19.5 of the Civil Procedure Rules which provides:

“(1) This rule applies to a change of parties after the end of a period of limitation under—

- (a) the Limitation Act 1980;
- (b) the Foreign Limitation Periods Act 1984; or
- (c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if—

- (a) the relevant limitation period was current when the proceedings were started; and
- (b) the addition or substitution is necessary.”

6 They rely on *Parsons v. George* (2) as authority for the proposition that the CPR, r.19.5(1)(c) applies to enactments which impose a limitation

period but do not prohibit such a change. The Limitation Act 1960 imposes a six-year limitation on actions in negligence but does not expressly prohibit a change of name after the six years have expired.

7 They further contend that no procedure is stipulated in our law for the substitution of parties. They therefore submit that the rule followed in the English High Court should be applied by virtue of r.6(1) of the Supreme Court Rules 2000. The rule provides:

“Where no other provision is made by these rules or by any Act, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court.”

8 Rule 19.5 gives effect to the provisions of s.35 of the Limitation Act 1980. The section provides:

“(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

...

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

...

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

9 By virtue of s.35, the substitution of a party is a separate action which is deemed to have commenced on the same date as the original action. The 1960 Limitation Act has no equivalent provision. That omission must be deemed to be intentional by the Gibraltar Parliament. Our statute on limitation is based on the English Limitation Act 1939.

10 In *Payabi v. Armstel Shipping Corp.* (3), applying *Ketteman v. Hansel Properties Ltd.* (1), Hobhouse, J. (as he then was) stated ([1992] Q.B. at 923):

“The scheme enacted by section 35 of the Act of 1980 is in material respects different from that which had existed under the Limitation Act 1939. It expressly addresses the question of relation back . . . subject to certain conditions being satisfied, to the date of the issue of the writ notwithstanding the expiry of a relevant limitation period between the date of the issue of the writ and the date of the making of the amendment.”

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11 Hobhouse, J. continued (*ibid.*, at 928) “the element of relation back introduced under the authority of section 35 cannot extend beyond the purposes of the Act of 1980. The source of any relation back has to be the Act of 1980.” He later stated (*ibid.*, at 932):

“The Act of 1980 is expressly restricted to its own subject matter. The relation back principle is not part of English procedural law save within the limited categories recognised by Brandon, L.J. in *Liff v. Peasley* and as enacted by section 35 of the Act of 1980. *Ketteman’s* case is still the governing authority for time limits outside the Act of 1980 and the Act of 1984.”

12 The law in Gibraltar does not include s.35 of the 1980 Act and therefore there is no concept of relating back. To hold as I have done is not, as Mr. Trinidad warns, to open a Pandora’s Box. The position is very simple. When we have an Act we follow it—not to do so because we might fall foul of the English Civil Procedure Rules is a far more dangerous situation to get into than living with the relatively small number of occasions when counsel and this court cannot follow the English rules. The application for substitution must be dismissed because it is statute-barred.

*Application dismissed.*