

[2018 Gib LR 19]

LAVARELLO and HYDE (joint liquidators of MARRACHE AND COMPANY) and LAVARELLO (as official trustee of the estates of I. MARRACHE, B. MARRACHE and S. MARRACHE) v. R. MARRACHE

SUPREME COURT (Yeats, Ag. J.): February 7th, 2018

Civil Procedure—pleadings—amendment—claim form and particulars may be amended at any time with court’s permission—claimants permitted to amend after hearing but before judgment to reflect fact that claim concerned properties devolved by defendant’s grandfather’s (not father’s) and mother’s estates—incorrect name in claim form and particulars had no influence on trial—amendment in interests of justice and no prejudice to defendant

The claimants sought, inter alia, a declaration that the defendant’s shares in the estates of his grandfather and mother vested in them.

The judge brought to the parties’ attention that the claimants’ claim form and particulars of claim referred to the estates of the defendant’s father and mother, whereas at trial it appeared that the parties proceeded on the basis that the relevant properties belonged to the estates of the defendant’s grandfather and mother. The judge indicated that, subject to discussion of the matter, his judgment was complete. The claimants initially stated that the particulars and claim form were clear and that the reference to the grandfather had been an error. They subsequently submitted that the reference to the father’s estate was an error and applied for the late amendment of the claim form and particulars of claim. This was opposed by the defendant.

Held, allowing the amendments:

It was in the interests of justice to allow the amendments. The claimants therefore had permission to amend the claim form and particulars of claim

to reflect the fact that their claim was against the properties devolved by the grandfather's estate and the mother's estate. The claim form and particulars of claim could be amended at any time with the court's permission (CPR r.17.1), including after the evidence was heard at trial. There would be no prejudice to the defendant in allowing the amendments even at this late stage. The incorrect reference in the pleadings to the father's estate instead of the grandfather's did not have any influence on how the trial was approached by either side. Indeed, it appeared that the error was not identified until it was raised by the judge. The court was in no doubt that the parties understood that all the family properties were the subject of the claim and that part of the portfolio was comprised of properties devolved to the defendant by his grandfather's estate. If the amendments were refused, a large part of the claimants' claim would simply have fallen away, merely as a result of an error (paras. 10–17).

Case cited:

(1) *Kelly v. Chief Const. (South Yorks.) (No. 1)*, [2001] EWCA Civ 1632, unreported, referred to.

N.P. Cruz and *C. Wright* for the claimants;
The defendant appeared in person.

1 **YEATS, Ag. J.:** This is an application by the claimants for a late amendment to the claim form and particulars of claim.

2 On Thursday, January 18th, 2018, the parties were informed that I wished to discuss the following issue:

“The Claim Form and Particulars of Claim refer only to the Estates of Samuel Abraham Marrache and Reina Marrache, whereas at trial, it appeared to Mr Yeats, that the parties were proceeding on the basis that the relevant properties belonged to the Estates of Abraham Samuel Marrache and Reina Marrache.”

I directed that the parties attend a hearing the following day.

3 On the same day, the claimants' solicitors sent the following communication to the Registry:

“We are of course happy to attend but the Particulars are clear as is the claim form. The two estates are those of the parents of the Defendant namely *Samuel Abraham* Marrache and *Reina* Marrache. Perhaps where the confusion has arisen is that in compliance with the order made on the 6th November 2017 we emailed the defendant and erroneously referred *to the father* by the *Grandfather's name* (*Abraham Samuel* Marrache) at the 2nd paragraph. It is clear however from the third paragraph that this was just a typo and that we were always referring to the father's estate. I do not think the parties disagree on this.”

4 The defendant, by way of reply, sent the following:

“However, to add to Mr. Cruz’s incomplete reply, as it pertains to Justice Yeats’ question regarding the respective wills and estates of my parents Samuel Abraham Marrache and Reina Marrache: A portion of my father’s estate, while he was living, was comprised of his inheritance from his father Abraham Samuel Marrache, and the balance of his estate was comprised of a portfolio of various assets which he had accumulated during his lifetime. The properties gifted to Samuel Abraham Marrache by his father, Abraham Samuel Marrache, in his will (attached to my Statement of Defence) included the conditions of the inheritance, ie., that upon the death of his son and heir Samuel Abraham Marrache, the assets would then be passed on to Samuel’s six sons and his great grandsons. The balance of Samuel Abraham Marrache’s estate, upon passing, was then inherited by Samuel’s wife Reina Marrache, until her passing. At the time of her passing, my siblings and I inherited the assets of my father’s estate, which had been Willed to our mother Reina at my father’s passing, excluding those assets that were gifted from my grandfather Abraham Samuel Marrache’s estate.”

5 Abraham Samuel Marrache was the defendant’s grandfather, Samuel Abraham Marrache his father, and Reina Marrache his mother. I shall refer to their estates as: “grandfather’s estate,” “father’s estate,” and “mother’s estate” respectively.

6 At the hearing on Friday, January 19th, 2018, I pointed out to Mr. Cruz a number of instances where Mr. Hyde had referred to the grandfather’s and the mother’s estates in his witness statements. Further, under the terms of the wills produced by the defendant, the father’s estate devolved to the mother. Under the grandfather’s will, a part of his estate was left on trust for the father during his lifetime and then upon his death to his male grandchildren. I did not of course know how the wills had been put into effect and I made it clear that this was a matter for the claimants. I indicated that, subject to the issue being discussed, my judgment was complete. I gave the claimants until close of business on Monday, January 22nd, 2018 to consider whether or not they wished to make an application for amendment. They did.

7 Mr. Cruz now submits that, despite his assertion to the contrary in his communication with the Registry of January 18th, 2018, the reference to the father’s estate was an error. That the parties were proceeding on the basis that the properties which are the subject of the claim are those forming part of the grandfather’s and the mother’s estates.

8 The application is opposed by Mr. Marrache. He complains that the claimants have constantly changed the form of their claim and that this has been unfair. That had the application been made at an earlier stage he

would have been able to address the issue in his defence and/or call other witnesses. His approach to the trial would have been very different.

9 Mr. Marrache then went further and submitted that he had understood that the only property in issue in the claim was the family home, *Fortress House*. Mr. Cruz's reply to that was to describe it as an extraordinary claim. I agree. The parties were clearly proceeding on the basis that the claim involved all of Mr. Marrache's interests in the family's properties. Indeed, at para. 18 of the particulars of claim the claimants list the following properties: 5 Cannon Lane, 197/199 Main Street, 201 Main Street, 206 Main Street, 220 Main Street, 9 Cathedral Square and 6–10 Cannon Lane. It is clear therefore that their claim always related to a portfolio of properties.

10 As the judge trying the case, it seemed to me that it was the grandfather's and mother's estates which were being considered at all times. Mr. Marrache himself referred to his grandfather's estate in his defence and exhibited the relevant wills.

11 The documents that I am referring to as the balance sheet and the draft 2008 agreement in my principal judgment both referred to properties which, the claimants say, passed to Mr. Marrache from his grandfather. These documents took a prominent place at trial. There was much discussion and examination related to these but at no point was there any question related to properties not falling within the claim because they formed part of a different estate to that pleaded by the claimants. At no time, either in writing or at trial, was there any hint of a suggestion that the claimants' claim should fail because the claim form and particulars referred to the wrong estate. It is almost, although not quite, a question of nomenclature. (As I have already alluded to, Mr. Hyde did correctly refer to the grandfather's estate in both of his witness statements.)

12 Mr. Marrache's defence to the claim was, broadly, as follows: (1) that there was no agreement to sell his interests in the family properties other than for an agreement in 2008 which was never completed; and (2) that he did not receive the amount of money from the firm that the claimants say he did.

13 I am therefore in no doubt that the parties understood that all the family properties were the subject of the claim and that part of the portfolio was comprised of properties devolved to the defendant by his grandfather's estate.

14 The claim form and particulars of claim can be amended at any time with the court's permission—CPR r.17.1. This includes after the evidence is heard at trial—see, as an example, *Kelly v. Chief Const. (South Yorks.) (No. 1)* (1).

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15 In my judgment there is no prejudice to the defendant in allowing the amendments even at this late stage. The incorrect reference to his father's estate instead of to his grandfather's estate in the pleadings did not have any influence on how the trial was approached by either side. Indeed, it would appear that the error went unidentified until it was raised by me. Furthermore, if I refuse the amendment, a large part of the claimants' claim simply falls away, merely as a result of an error.

16 It is in the interests of justice that I allow the amendments and I shall therefore do so.

17 The claimants have permission to amend the claim form and particulars of claim to reflect the fact that their claim is against the properties devolved by the grandfather's estate and the mother's estate in the manner set out in the drafts attached to the application notice. I am not however extending permission for the inclusion of the words "referred to in the Grandfather's Will as 5/9 Cannon Lane but now known as 5 Cannon Lane, 197/199 Main Street, 201 Main Street" as contained in para. 18 of the proposed amended particulars of claim. This is a new assertion for which there is no evidence.

Order accordingly.
