1960

PIDDINGTON v. BATES.

Lord Parker C.J.

the street, trying to form pickets at the doors. On that ground alone, coupled with the telephone call which, I should have thought, intimated some sense of urgency and apprehension, the police were fully entitled to think as reasonable men that there was a real danger of something more than mere picketing to collect or impart information or peaceably to persuade. I think that in those circumstances the prosecutor had reasonable grounds for anticipating that a breach of the peace was a real possibility. It may be, and I think this is the real criticism, that it can be said: Well, to say that only two pickets should be allowed is purely arbitrary; why two? Why not three? Where do you draw the line? I think that a police officer charged with the duty of preserving the Queen's peace must be left to take such steps as on the evidence before him he thinks are proper. I am far from saying that there should be any rule that only two pickets should be allowed at any particular door. There, one gets into an arbitrary area, but so far as this case is concerned I cannot see that there was anything wrong in the action of the prosecutor.

Finally, I would like to say that all these matters are so much matters of degree that I would hesitate, except on the clearest evidence, to interfere with the findings of magistrates who have had the advantage of hearing the whole case and observing the witnesses. I am of opinion that the appeal of Piddington should be dismissed. As, I understand, it is conceded that the other case of Robson and Tee must then fail, I would dismiss that also.

ASHWORTH J. I agree and have nothing I can usefully add.

ELWES J. I also agree.

Appeals dismissed with costs.

Solicitors: *Shaen, Roscoe & Co.; Solicitor, Metropolitan Police.*

[COURT OF APPEAL.]

C. A.

1960
Nov. 1, 2.

*DAVIES *v.* ELSBY BROTHERS LTD.

[1959 D. No. 86.]

Pearce and Devlin L.JJ.

Practice — Parties — Misdescription — Amendment — Defendant limited company wrongly described as a firm—Whether power to amend—Limitation of action.

On March 18, 1959, the plaintiff issued a writ against "Elsby "Brothers—a firm," claiming damages for negligence in respect of injuries sustained while he was an employee of the defendants. The accident giving rise to the cause of action occurred on March 20, 1956, though this date did not appear on the writ. The plaintiff

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

had been employed by the firm of Elsby Brothers until the firm's business was taken over by a limited company, Elsby Brothers Ltd., in 1955, and thereafter the plaintiff continued in the employment of the company. Before the writ had been served, it was amended on March 17, 1960, by striking out the words "a firm" and adding the word "Limited" to "Elsby Brothers," and the writ as amended was served on the same day.

Elwes J. allowed the defendants' appeal from the registrar's refusal of their application to set aside the writ on the ground that the company were substituted as defendants after the claim against them had become barred by the expiration of three years from the date of the accident by virtue of the Limitation Act, 1939, as amended.

The plaintiff appealed:—

Held, that the firm and company being two separate entities, and there being nothing on the writ to indicate that it must have been intended for the company, the original description of the defendants on the writ was not a mere misnomer, and the court had no power to allow by amendment the substitution of a new party, the company, as defendants, the claim against whom was statute barred by the Limitation Act, 1939, as amended.

Beardmore Motors Ltd. v. *Birch Bros. (Properties) Ltd.* [1959] Ch. 298; [1958] 2 W.L.R. 975; [1958] 2 All E.R. 311 and *Mabro* v. *Eagle, Star & British Dominions Insurance Co. Ltd.* [1932] 1 K.B. 485, C.A. applied.

Decision of Elwes J. affirmed.

INTERLOCUTORY APPEAL.

A writ was issued on behalf of the plaintiff, Henry Davies, on March 18, 1959, against "Elsby Brothers—a firm," of Sneyd Hill, Burslem, Stoke-on-Trent, claiming damages for injuries and loss sustained by the plaintiff while an employee of the defendants owing to the negligence of the defendants and/or their servants. The writ was issued in respect of an accident to the plaintiff in the course of his work on March 20, 1956, and his cause of action would accordingly have become statute barred by virtue of the Limitation Act, 1939, as amended, on March 20, 1959. The date of the accident did not appear upon the writ. Prior to the accident, in 1955, the business of the firm of "Elsby Brothers" by whom the plaintiff was employed was taken over by a limited company, Elsby Brothers Ltd., and thereafter the plaintiff continued in the employment of the company.

The plaintiff did not consult his solicitors until March, 1959, when he told them that his employers were Elsby Brothers of Sneyd Hill, Burslem. Before issuing the writ, the plaintiff's solicitors confirmed the name of the employers by looking at the current telephone directory, which contained an entry in the name of "Elsby Brothers," a firm, at Sneyd Hill. They therefore issued the writ against Elsby Brothers at that address. The writ was not served immediately. Just before the end of of the period of one year during which the writ remained effective, it was discovered that the name of the defendants on the writ was incorrect. The writ was therefore amended on March

C. A.
1960
DAVIES v. ELSBY BROTHERS LTD.

17, 1960, by striking out the words "a firm" and adding the word "Limited" to "Elsby Brothers." The amended writ was served on the last day of the time allowed, March 17, 1960.

The defendants applied to set aside the writ, their application being refused by the registrar. On appeal, Elwes J., on July 5, 1960, set aside the writ, holding that he had no discretion to allow an amendment that would deprive the defendants of a defence that had accrued under the Limitation Act, 1939, as amended, the company having been substituted as defendants after the claim against them had become statute barred.

The plaintiff appealed by leave of Elwes J.

M. A. B. King-Hamilton Q.C. and *John Newey* for the plaintiff.

G. G. Baker Q.C. and *Frank Blennerhassett* for the defendants.

The following cases which were cited in argument are not referred to in the judgment: *Hill* v. *Luton Corporation* *; *Alexander Mountain & Co.* v. *Rumere Ltd.*†; *Steward* v. *North Metropolitan Tramways Co.*‡; *Noble Lowndes and Partners* v. *Hadfields Ltd.*§

PEARCE L.J. stated the facts and continued: Elwes J. was largely guided by *Beardmore Motors Ltd.* v. *Birch Bros. (Properties) Ltd.*[1] There the applicants had named in their counter-notice under the Landlord and Tenant Act, 1954, the company which had been, and not the company which was, the landlord of the premises. Harman J. held that he had no discretion to allow a proposed amendment which would constitute a substitution of a party in respect of a counter-notice under the Landlord and Tenant Act, 1954, which was out of time. The mistake was, in his opinion, more than a mere misnomer, since an existing, separate company was properly described on the original counter-notice and the substitution of another company was desired; and therefore he could not depart from the settled rule that an amendment should not be allowed if it interferes with the defendant's vested rights under the Statute of Limitations.

Mr. King-Hamilton, who has given us the benefit of a careful and forceful argument, distinguishes that case in that there were the two co-existing companies and the wrong company was sued: while here there was only one company, which took over the business of the firm. Moreover, the plaintiff expressly by his writ was suing his employers as such at the correct address. He merely misdescribed them as a firm when he should

* [1951] 2 K.B. 387; [1951] 1 T.L.R. 853; [1951] 1 All E.R. 1028.

† [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 482, C.A.

‡ (1886) 16 Q.B.D. 556; 2 T.L.R. 263, C.A.

§ [1939] 1 Ch. 569.

[1] [1959] Ch. 398; [1958] 2 W.L.R. 975; [1958] 2 All E.R. 311.

have described them as a limited company. He referred to two old cases (*Horton* v. *Stamford Inhabitants* [2] and *Lakin* v. *Watson* [3]) in 1833 and 1834, where amendments had been allowed; but they do not seem to me to help, because they were decided on the basis that amendments should be allowed in order to prevent the plaintiff losing his remedies through their becoming statute barred. That was apparently the view held at that time. But a different point of view emerged in *Challinor* v. *Roder* [4] which caused Denman J. and Grove J. to differ. Grove J. held that it was wrong to allow the plaintiff to amend ex post facto if that would deprive the defendant of the benefit to which he had become entitled as of right under the Statute of Limitations. That latter view prevailed in the later cases, and has been clearly laid down in this court, so far as the addition of a plaintiff is concerned, in *Mabro* v. *Eagle, Star & British Dominions Insurance Co. Ltd.* [5]

In my opinion the addition of a defendant is governed by the same considerations as the addition of a plaintiff. Therefore the principle of *Mabro's* case [5] prevents the amendment in this case if the amendment involves the addition of a party and not the mere correction of a misnomer. That principle also applies to the substitution of a party, since substitution involves the addition of a party in replacement of the party that is removed. Moreover, if, contrary to that principle, a party were added or substituted, then the final words of R.S.C., Ord. 16, r. 11, would defeat the purpose of the addition or substitution since the new defendant could still rely on the statute against the party so added. Those words are: " . . . and the proceedings " as against such party shall be deemed to have begun only on " the service of such writ or notice."

If, however, the addition of the word " Limited " is not the addition or substitution of a party but the mere correction of a misnomer, we can properly allow it, if the merits justify that course. But, is this the mere correction of a misnomer? Mr. King-Hamilton argues that the real question is: who did the plaintiff intend to sue? There was, he argues, only one party in existence at one time, since the two parties concerned, namely the firm and the company, were mutually exclusive and were consecutively engaged in carrying on the same business; and he relied on Harman J.'s words in *Beardmore Motors Ltd.* v. *Birch Bros. (Properties) Ltd.* [6]: " It is not as if the other " title were that of a non-existent person, or that they were " under any misapprehension."

Mr. Baker relies on a dictum of du Parcq L.J. in *W. Hill & Son* v. *Tannerhill,* [7] where a writ in the firm name " W. Hill " & Son " was amended to read " W. Hill trading as W. Hill &

[2] (1833) 1 Cr. & M. 773.
[3] (1834) 2 Cr. & M. 685.
[4] (1885) 1 T.L.R. 527, D.C.
[5] [1952] 1 K.B. 485, C.A.
[6] [1959] Ch. 298, 304.
[7] [1944] K.B. 472; 60 T.L.R. 410, C.A.

C. A.
1960
DAVIES v. ELSBY BROTHERS LTD.
Pearce L.J.

" Son." du Parcq L.J. said [8]: " If the writ had been issued in " the name of ' W. Hill & Son Limited ' the case would have been " different, because ' W. Hill & Son Limited ' indicates a legal " entity and a person." Similarly, Mr. Baker argues, the amendment in this case is a substitution and not a misnomer; the writ must contain the actual entity of the defendant, and here the entity of the defendant, namely the limited company, is not set out. He also relies on *Tetlow* v. *Orela Ltd.*[9] where an action was commenced in the name of a dead man and the court refused to allow substitution of his executor as a plaintiff, and on *Finnegan* v. *Cementation Co. Ltd.*[10] as showing how strict this court has been about amendments in such circumstances as these. In the latter case, a widow sued in respect of a fatal accident as " the " widow and administratrix " of the deceased, suing " for the " benefit of the dependants of the deceased and his estate." It turned out that her administration only ran in Southern Ireland and so she could not be regarded as administratrix in England; and although, had she omitted the words " as administratrix," she would have been covered by the description of " widow " and her action would then have been good, yet her action was brought in her capacity as administratrix. This court refused to allow her to amend by deleting the words " and administratrix," holding that she had brought her writ in a different capacity from that in which she now desired to continue her action. Singleton L.J. there said [11] that the court was very reluctant to insist on a technicality but it was compelled to do so.

The case before us is not easy, but I am persuaded that Mr. Baker is right in arguing that the entity of the limited company is not contained on the writ, and that to add the word " Limited " would be to add a new party to this action. It is not correct to say that the company has taken the place of the firm. The firm no doubt assigned its business to the company; but it co-existed with the company, as the two companies in *Beardmore Motors Ltd.* v. *Birch Bros. (Properties) Ltd.*[12] co-existed. After the company had taken over its business the firm could have been sued in respect of an accident that happened while the firm was still carrying on the business.

If one of the deciding factors be whether the defendants, on looking at the writ, must have known that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being the two definite, separate entities, the firm and the company, it is not possible to

[8] [1944] K.B. 472, 475.
[9] [1920] 2 Ch. 24.
[10] [1953] 1 Q.B. 688; [1953] 2 W.L.R. 1015; [1953] 1 All E.R. 1130, C.A.
[11] [1953] 1 Q.B. 688, 699.
[12] [1959] Ch. 298.

say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company.

I arrive at that conclusion reluctantly, because it is based on a technicality. But so far as merits are concerned, the plaintiff has brought the matter on himself. He waited for three years. There was no correspondence or bargaining to justify the delay. Moreover, the writ, when issued just within the statutory period of three years, was not served until the 364th day of the following year—that is to say, one day before it would finally expire. When plaintiffs delay in that way it becomes very difficult for actions to be properly tried. And if, having left the matter so late, they get into any technical difficulties (as this plaintiff did) they are liable to find that they have no opportunity to set the matter right.

For those reasons, in my opinion Elwes J. was right; and the appeal must be dismissed.

DEVLIN L.J. For the reasons which my Lord has given, the issue in this case is simply whether or not the description of the defendants on the writ can be regarded as a mere misnomer. If it can, it can be corrected without the addition of a party: the entity remains the same. If it cannot, if it refers to an entity which is not the intended defendant, Elsby Brothers Ltd., then the only way of putting the matter right is to substitute another entity, and, as my Lord says, that involves the addition of a defendant and, for the reasons which he has given, that cannot, in the circumstances of this case, be done. Therefore, the question is: is it a mere misnomer or is it not?

Mr. Baker has argued that, when the distinction is between an entity such as a person or a firm and an entity such as a limited company, the omission of the word "Limited" is fatal: it ceases to be a mere matter of description, he says: it is not like a case where one of the Christian names of the defendant has been got wrong: without the word "Limited" a company cannot be identified as an entity at all. That means (as my Lord pointed out in the course of the argument) that, in the case of a very well known concern such as Harrods, if it were sued as "Harrods" and the word "Limited" was left out, the correction could not be made as the correction of a misnomer, notwithstanding that everybody would be aware that it was Harrods Limited that was intended. I assume for this purpose (as I think we all assumed for the purpose of the illustration) that Harrods had been a limited company for a very long time and there was, therefore, nothing but the limited company that could be intended to be meant by the use of the word "Harrods."

That argument seems to me to be rather extreme. I do not have to decide whether it is right, because I think that Mr. Baker can succeed in putting his case less high than that. I therefore do not want to be taken to be acceding to that proposition. It is a matter which may have to be determined hereafter.

C. A.
1960
DAVIES
v.
ELSBY
BROTHERS
LTD.
Devlin L.J.

Mr. King-Hamilton's argument, on the other hand, is that this is a misnomer because there can be no doubt that the person whom the plaintiff intended to sue was his employer, and his employer at the time of the accident was the company. I think that that is going to the opposite extreme on the other side and I could not assent to that. It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many Continental systems. In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean; and that, I think, is the test which ought to be applied as a general rule in cases of misnomer—which may embrace a number of other situations apart from misnomer on a writ, for example, mistake as to identity in the making of a contract. I think that the test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they "have got my name wrong," then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell "from the document itself whether they mean me or not and I "shall have to make inquiries," then it seems to me that one is getting beyond the realm of misnomer.

One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer. To take an example which Mr. King-Hamilton put, if there had never been a firm of Elsby Brothers, if no business had been carried on before the company was formed, then it might well be that there would be no possibility of confusion: there would be only one entity which, under the description of "Elsby Brothers," could be meant, and the description of it as a firm would be an obvious misnomer. It would be like the case of Harrods which we discussed in the course of the argument. Here, as it seems to me, there are two entities, one of which is correctly described as "Elsby Brothers, "a firm," the other of which is not; and there is nothing to show on the document that it was clearly intended to be addressed to the entity that was not within the description. As my Lord has pointed out, there is no date for the accident given on the indorsement of the writ. Therefore, when Mr. King-Hamilton says that the plaintiff intended to sue his employers the question arises: Yes, but his employers at what time? If the accident occurred before 1955, when the company was formed, then his employers were Elsby Brothers, a firm. If the accident occurred after that date, then his employers were Elsby Brothers Limited. No person receiving this document could know who was intended to

C. A.
1960
DAVIES v. ELSBY BROTHERS LTD.
Devlin L.J.

be the defendant unless inquiries were made to ascertain the date of the accident, and possibly other relevant material.

In my judgment, therefore, and taking in Mr. King-Hamilton's favour the less rigid test than the one that Mr. Baker proposed, this is not a case of misnomer; and I agree with my Lord that we have no power to amend the writ and that, therefore, the appeal must be dismissed.

I agree also with what my Lord has said on the question of technicality in relation to the fact that this writ was issued and served at the last possible moment. I do not believe that the dangers of that course are as apparent to litigants or to their solicitors as they ought to be. It may not be merely a question of misnomer. The cause of action may not be correctly described on the writ, and if it is not, then instead of an amendment being easily made according to the ordinary principles by which the court endeavours to allow amendments wherever it can without injustice, the plaintiff may find himself in a technical difficulty. This much at least is certain, that anybody who wants to sail so close to the wind ought to take the most extreme care to see that the names of the parties and the cause of action are properly described and defined on the writ.

I agree that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co. for Hawley & Phoenix, Longton; Barlow, Lyde & Gilbert.*

[CHANCERY DIVISION.]

* INLAND REVENUE COMMISSIONERS *v.* R. WOOLF & CO. (RUBBER) LTD.

SAME *v.* ROMMOR (RUBBER) LTD.

1960
Nov. 8, 9.
Danckwerts J.

Revenue — Surtax — Company — "Member" of company — Meaning— "Share or interest" in "capital"—Whether debenture stockholders have an "interest" in company—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 245, 246, 255, 256.

On the death in 1950 of a principal shareholder in a company, "the old company," a new company was formed and arrangements were made for payment of death duties on his estate and for enabling surviving shareholders to make like provision for themselves. The old company's shareholders were the deceased's three brothers and a sister-in-law and his executors: the nominal capital of the new company was £10,000 divided into 10,000 ordinary shares of £1 each of which only 1,000 were issued and fully paid up, as to 50 to the sister-in-law and as to the balance of 950 to the trustees of 16 family trusts, the shareholding being so arranged that no five