[2018] JMSC Civ.161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 05227

BETWEEN	**MARGARET BLAGROVE**	**CLAIMANT/APPLICANT**
AND	**SUPERCLUBS INTERNATIONAL LIMITED**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Mr. Lemar Neale instructed by Bignall Law for the Claimant/Applicant

Mrs. Nickeisha Young Shand instructed by Earle & Wilson for the Defendant/Respondent

Heard: July 12, September 21 and October 12, 2018

Civil Procedure-Substitution of parties– Rule 19.4 of the Civil Procedure Rules 2002- Significance of relevant limitation period in the context of Rule 19.4 and the Limitation Act - Service out of the jurisdiction – Rules 7.3 and 7.5 of the Civil Procedure Rules 2002 considered - Without prejudice communication – Legal principles governing without prejudice communication

PALMER HAMILTON, J. (AG.)

BACKGROUND

[1] The matter concerns an application by the Claimant (hereinafter referred to as the Applicant) to substitute V.R.L. Management Limited and BRL Limited as Defendants in the Claim.

[2] The Applicant, in her initiating documents, seeks to recover from Superclubs International Limited damages for negligence and breach of duty under the **Occupier's Liability Act**, **1969** and at common law. The Claim arose from injuries she sustained on the property of Breezes Resort & Spa Trelawny during the course of her employment with Superclubs International Limited.

[3] The Applicant alleges that on the 24th day of April 2010, while acting in the course of her employment at Breezes Resort & Spa Trelawny, she was in the process of walking with garbage towards a compactor, when she slipped and fell to the ground due to the surface being wet.

[4] Superclubs International Limited filed a Defence declaring that it is not the Applicant's employer and stated that the Applicant was at all material times employed to V.R.L. Management Limited.

[5] The Applicant subsequently filed a Notice of Application for Court Orders seeking to amend her Claim. The amended application seeks the following Orders: -

> *"1. V.R.L. Management Limited and BRL Limited be substituted as First and Second Defendants in these proceedings;*
>
> *2. Permission be granted to the Claimant to serve the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein out of the jurisdiction on the BRL Limited;*
>
> *3. The Defendants be permitted to file their Acknowledgement of Service and Defence within 28 days and 56 days respectively after service of the Amended Claim and Particulars of Claim;*
>
> *4. The time for filing and serving this application on BRL Limited be abridged.*
>
> *5. Costs of this Application be costs in the claim; and*
>
> *6. Such further and other relief as this Honourable Court deems fit."*

[6] The application before the Court is supported by the Affidavits of Mr. Paul O. Bignall and that of the Applicant. The Applicant in her Affidavit contends that her Attorneys-at-Law wrote to Breezes Resort & Spa Trelawny advising them of the incident. By letter dated the 4th day of April 2011, General Accident Insurance

Company Limited responded to the letter and indicated their insured to be *"Superclubs Int'l Ltd &/or Their Respective Subsidiaries, Associated & Affiliat*" - (sic). This letter is exhibited to her Affidavit.

[7] The Applicant declares that it was this indication in the letter that led her to believe that Superclubs International Limited was the owner of Breezes Resort & Spa Trelawny and thereby instructed her Attorneys-at-Law to commence proceedings against Superclubs International limited.

[8] She further avers that it was the contents of the Defence that alerted her to the fact that Breezes Resort & Spa Trelawny is owned by V.R.L. Management Limited. A search was subsequently conducted at the Companies Office of Jamaica by her Attorneys-at-Law and this revealed that Breezes Resort & Spa Trelawny is owned by BRL Limited. The Applicant submits that the filing of the Claim against Superclubs International Limited was therefore a genuine mistake.

[9] Superclubs International Limited, V.R.L. Management Limited and BRL Limited (hereinafter collectively referred to as "the Respondents") contest the application by way of an Affidavit of David Kay in Opposition to Notice of Application for Court Orders. They maintain that the letter from the insurance company is without prejudice communication and ought not to be before the Court. They further assert that the Claim against V.R.L. Management Limited and BRL Limited is statute barred as the six (6) year limitation period has expired.

ISSUES

Preliminary Objection

[10] When I heard the matter on the 12th day of June 2018, as a point in limine, I dealt with the issue of whether the letter dated the 4th day of April 2011 from Superclubs International Limited's insurers (hereinafter referred to as "the letter") can be tendered into evidence.

The Applicant's Position

[11] The Applicant relied on the guidance outlined in the case of **In Re Daintrey Ex Parte Holt** [1893] 2 Q.B. 116 on whether a correspondence should attract the label "without prejudice". Learned Counsel for the Applicant cited the dictum of Vaughn Williams J at page 119 of the judgment as follows: -

> *"In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.*
>
> *The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms."*

[12] The Applicant submitted that the letter does not attract the "without prejudice" label as there is no offer of terms. The insurers of Superclubs International Limited merely confirmed their insured and ascribed liability to it. It did not go further to make an offer.

[13] Learned Counsel for the Applicant further maintained that in any event, Superclubs International Limited cannot say it will be prejudiced by the Applicant's reliance on the letter. This is because it says in its Defence that it was not the Applicant's employer. If Superclubs International Limited was not the Applicant's employer, then it would not have had any basis to make an offer or write a "without prejudice" letter to the Applicant.

[14] It was also proffered that the Applicant's sole basis for relying on the letter is to show that Superclubs International Limited's insurers gave her the impression that Breezes Resort & Spa Trelawny was associated with Superclubs International Limited and was in fact its registered business. This, the Applicant maintains could only explain why the insurers wrote in response to a letter

addressed to Breezes Resort & Spa Trelawny and introduced Superclubs International Limited as their insured.

The Respondents' Position

[15] The Respondents submitted that the letter ought not to be before the Court as it is a without prejudice communication and relied on the case of **Adolph Brown v West Indies Alliance Insurance Company Limited** (unreported), Supreme Court Jamaica, Claim No. 2007 HCV 03483, judgment delivered the 4th day of June 2010 to support this submission.

[16] Learned Counsel for the Respondents cited Mangatal J at paragraphs 19-21 of the judgment as follows: -

> *"19. The elements of the rule with regard to without prejudice communication were outlined in the English decision of **Cutts v. Head** [l9841 ADR.L.R. 12/07. At page 5 of the judgment, Oliver L.J. makes extensive reference to the case of **Walker v. Wilsher** (1883) 23 Q.B.D.335, and the statements of the law by Lord Esher M.R. (at page 336-337) and Lord Lindley L.J. (at page 337 and 338), respectively, which statements are instructive:*
>
> > *"It is I think a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of the parties, otherwise the whole object of the limitation would be destroyed. I am therefore, of the opinion that the learned judge should not have taken these matters into consideration…."*
> >
> > *"What is the meaning of words "without prejudice"? I think they mean without prejudice to the position of the writer if the terms he proposes are not accepted.... 'No doubt there are cases where letters written without prejudice may be taken into consideration as was done the other day in a case in which the question of laches was raised. The fact that such letters have been written and the dates at which they were written may be regarded, and in so doing the rule to which I have averted would not be infringed. The facts, may, I think, be given in evidence, but the offer made and the mode in which that offer was dealt with- the material matters, that is to say, of the letters-must not be looked at without consent."*

20. Oliver L.J. at page 7 of the judgment describes the nature of the underlying public policy as follows:

> *It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings.*

*21. Tim Reid, in his article entitled **"How to use "Without prejudice" and "Subject to Contract"** states the following to be exceptions to the Rule:*

i) when a party applies for its costs in court under C.P.R. Part 36 or in an arbitration;

ii) if the exclusion of the evidence would act as a cloak for improper threats, perjury, blackmail or other unambiguous impropriety;

iii) if the issue is whether "without prejudice" communications have resulted in a concluded compromise agreement;

iv) in order to show that an agreement concluded during negotiations should be set aside on the grounds of misrepresentation, fraud or undue influence;

v) if there is no concluded compromise agreement, but a clear statement is made by one party in the negotiations on which the other party is expected to act and does in fact act; and

vi) in order to explain delay or apparent acquiescence".

[17] The Respondents maintained that the letter is asking the Applicant's Attorney-at-Law to submit their details of claim, that is, their proposal and this implies that there is a negotiation in the process.

[18] Learned Counsel further submitted that the Respondents have not consented to the use of the letter and none of the exceptions outlined in the **Adolph Brown v West Indies Alliance Insurance Company Limited** (supra) applied.

Law, Analysis and Disposition

[19] After hearing submissions from both Learned Counsel in my oral judgment on this point, my analysis of the law and my disposition were as follows: -

> *"I have considered the submissions made by both Learned Counsel for the Applicant and the Respondents. I have also carefully considered the cases of* ***In Re Daintrey Ex Parte Holt*** *[1893] 2 Q.B. 116 and* ***Adolph Brown v West Indies Alliance Insurance Company Limited*** *(unreported), Supreme Court Jamaica, Claim No. 2007 HCV 03483, judgment delivered the 4th day of June 2010.*
>
> *Firstly, it is quite clear from both cases that in order for me to make a determination as to whether the "without prejudice" letter should be excluded, I will need to look at the document to ascertain whether "the conditions under which the above rule applies, exist."*
>
> *I note that the rule has no application to a document which in its nature, may prejudice the person to whom it is addressed. Mangatal, J (as she then was) in the* ***Adolph Brown v West Indies Alliance Insurance Company Limited*** *(supra) case relied on the statements of Lord Esher and Lord Lindley L.J. which stated: "What is the meaning of words "without prejudice"? I think they mean without prejudice to the position of the writer if the terms he proposes are not accepted."*
>
> *In my judgment, the two key parties who may be subject to prejudice would be the writer of the "without prejudice" document and the person to whom the "without prejudice" letter is addressed. Neither of these parties is affected as Bignall Law (the recipient of the letter) is seeking to rely on it and the writer is the Insurance Company of Jamaica Limited.*
>
> *In examining the nature of the letter, it seems to be a proposal or invitation towards a negotiation, with no indication of it being concluded.*
>
> *The purpose for which it is being relied on goes only to the root of the issue to be determined in this application which is relevant to whether the Defendant is Super Clubs International Limited.*
>
> *In my view, this could fall within the exceptions under paragraphs (iii) and (v) where Mangatal, J quotes from this article by Tim Reid entitled* ***"How to use "Without prejudice" and "Subject to Contract****."*
>
> *Paragraph 111) stipulates: "if the issue is whether "without prejudice" communications have resulted in a concluded compromise agreement."*
>
> *Paragraph v) stipulates: "if there is no concluded compromise agreement, but a clear statement is made by one party in the negotiations on which the other party is expected to act and does in fact act."*

I find therefore that the "without prejudice" letter is admissible and can be relied on."

[20] What is now left to be determined by me are the following issues: -

(1) Whether V.R.L. Management Limited and BRL Limited should be substituted in the Claim after the relevant limitation period?

(2) Will V.R.L. Management Limited and BRL Limited be prejudiced should they be substituted in the Claim?

(3) Whether permission ought to be granted to serve the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein out of the jurisdiction on BRL Limited?

[21] I have been assisted by written and oral submissions from both Learned Counsel appearing in the matter. I have summarized the submissions to the extent vital to explain my findings. I intend no disrespect to Counsel by doing so and I am grateful for their able assistance.

Whether V.R.L. Management Limited and BRL Limited should be substituted in the Claim after the relevant limitation period?

The Applicant's Case

[22] The Applicant relies on Rule 19.4 of the **Civil Procedure Rules, 2002** (hereinafter referred to as "the CPR") as amended and states that this rule contains the Court's power to substitute a party after the end of the relevant limitation period.

[23] Learned Counsel for the Applicant maintains that the Claim was started in 2012 and so the relevant limitation period was current, since the incident that caused the Applicant's injuries occurred in 2010. The Applicant submits that the substitution of V.R.L. Management Limited and BRL Limited is necessary as the

Claim cannot be properly carried on against Superclubs International Limited unless both are substituted.

[24] The Applicant further submits that, moreover, Superclubs International Limited would have been named in error as a result of the action of its agent. Learned Counsel cited the Court of Appeal judgment of Keene LJ in the case of **Horne-Roberts v SmithKline Beecham plc and another** [2002] 1 WLR 1662 and paragraphs 18-20 in support of this submission. He also cited paragraph 31 of the judgment of the Honourable Mr. Justice Bryan Sykes in the case of **Elita Flickinger v David Preble and Xtabi Resort Club & Cottages Limited** (unreported), Supreme Court Jamaica, Suit No. C.L.F 013 of 1997, judgment delivered the 31st day of January 2005 to support his submissions.

[25] Learned Counsel for the Applicant proffers that based on the Particulars of Claim filed in this matter, the Applicant's pleaded case is premised on a contract of employment and this suggests that she intended to sue her employer. Furthermore, the averments such as, failure on the part of Superclubs International Limited to provide and maintain an adequate and suitable system of work and suitable plant and equipment put the matter beyond doubt.

[26] In examining how the error of adding Superclubs International Limited's name came about, Learned Counsel maintains that the Applicant signed an employment contract in which it was stated that the agreement was being made with Breezes Resorts & Spa Trelawny. The Applicant therefore cannot be faulted for believing that Breezes Resorts & Spa Trelawny was her employer. Therefore, based on information contained on Superclubs International Limited's website, the Applicant's Attorney-at-Law served a pre-action protocol letter to Breezes Resorts & Spa Trelawny at Superclubs International Limited's registered address.

[27] The response from the insurers confirmed for the Applicant that Superclubs International Limited was the owner of Breezes Resorts & Spa Trelawny. This then led the Applicant to start these proceedings naming it as a party.

[28] Superclubs International Limited filed a Defence in which it denied that the Applicant was employed to it and identified V.R.L Management Limited as her employer. Although checks made by the Applicant's Attorneys-at-Law revealed that the entity had the same registered address as that of Superclubs International Limited, the Applicant was reluctant to sue V.R.L Management Limited, seeing that she had no contractual relationship with that entity. She was therefore adamant that Breezes Resorts & Spa Trelawny was her employer and was owned by Superclubs International Limited.

[29] Learned Counsel submits that the Applicant believed that Superclubs International Limited wanted to deceive her, having changed from the position as contained in the letter from its insurers to the matters alleged in its Defence.

[30] The Applicant subsequently discovered that although she signed a contract with Breezes Resort & Spa Trelawny, no such entity has ever existed on the register at the Companies Office of Jamaica. A letter dated the 20th day of November 2017 from the Registrar of Companies informed the Applicant of this and this letter was exhibited to her Affidavit.

[31] Learned Counsel for the Applicant submits that there is some doubt as to who was the Applicant's employer. It would appear that she was deceived as to the actual identity of her employer.

[32] Also, the Applicant proffers that Superclubs International Limited exhibited a copy of her pay advice that purports her employer to be *"V.R.L. Management Limited T/A Breezes Trelawny"* and this further compounded the confusion as to who her actual employer was. A third entity had now been introduced, "Breezes Trelawny".

[33] The Applicant submits that it is now prudent to substitute V.R.L Management Limited and BRL Limited as Defendants in the Claim so that the Court can properly determine who the Applicant's employer was.

The Respondents' Position

[34] The Respondents submit that the real question for the Court to consider was who the Applicant intended to sue. Learned Counsel for the Respondents cited the case of **Horne-Roberts v SmithKline Beecham plc and another** (supra) in support of this submission.

[35] Learned Counsel for the Respondents contend that the Applicant argued that she intended to sue her employers, however, she did not sue Breezes Resort & Spa Trelawny, but instead she sued Superclubs International Limited who was neither her employers nor the owner or occupier of the property to which the Applicant was employed.

[36] The Respondents also proffer that the Applicant's duty is to prove her assertions however, she indicated that she is employed to BRL Limited without providing any proof of this. The Applicant wishes to add V.R.L Management Limited for the Court to decide the issue of who is her employer.

[37] The Respondents maintain that BRL Limited is an overseas company incorporated in Cayman Islands and registered to do business in Jamaica. In any event, BRL Limited is a not a proper party herein and would be unduly prejudiced as it was not, at any material time, in ownership, occupation and/or control of the premises referred to as Breezes Resort & Spa Trelawny. Further, the Applicant was never employed to BRL Limited. BRL Limited operated Breezes Resort & Spa Trelawny Rio Bueno more popularly known as the Braco Hotel in Trelawny, which is a different property from Breezes Resort & Spa Trelawny.

[38] The Respondents aver that the Applicant was employed at all material times by V.R.L. Management Limited. The payslips exhibited confirms this. The Applicant

and her Attorneys-at-Law were made aware of this from the 1st day of February 2013. The Respondents submits that the "mistake" herein made by the Applicant is not genuine as she was aware of who the proper party was. Instead, the Applicant negligently decided to proceed with the suit against the wrong party and therefore should not be allowed to substitute V.R.L Management Limited at this stage.

[39] Learned Counsel for the Respondents also asserts that the Claim herein is statute barred against V.R.L. Management Limited and BRL Limited. As such, allowing a substitution of both would be highly prejudicial at this stage, especially in light of the fact that the Applicant was notified of the proper party from February 2013 when the Defence was filed, a time that the limitation period was still extant.

[40] The Respondents indicate that in **Civil Procedure Rules, 1998 The White Book Service**, at paragraph 19.5.11 it is said that if the court is satisfied that the relevant limitation period was current when the proceedings were started, and the addition or substitution is necessary, the question remains whether in the exercise of the court's discretion, the addition or substitution of the new party should be allowed. That discretion should be exercised in accordance with the overriding objective, including the cost and delay in initiating the proceedings and the volume of evidence contained therein. Also, all relevant circumstances should be taken into account, including prejudice to the parties, and whether a fair trial of the issues in the new claim (involving the new party) is possible.

[41] Learned Counsel for the Respondent indicates that the case of **American Leisure Group Limited v Olswang LLP** [2015] EWHC 629 (Ch) is instructive in this regard. The Master held that the court did have jurisdiction under rule 19.5 (3) (a) to substitute a new party for a party named in the claim form by mistake, but that, on grounds of delay, the application should be dismissed. On appeal to HH Judge Walden-Smith, these decisions were upheld. The decision as to delay was an exercise of discretion which the Master was entitled to make. The claim

form had been issued a few days before the expiry of a six (6) year limitation period, the particulars of claim had been served just within the four (4) month period allowed, there had been no pre-action contact with the defendant and the claimant had been slow applying for an order of substitution until just a few days before the hearing of the defendant's application to strike out.

[42] Learned Counsel for the Respondent submits that the incident herein allegedly occurred on the 24th day of April 2010 and as such the six (6) year limitation period would have expired on or about the 23rd day of April 2010. This application herein was filed on the 23rd day of June 2017 and amended on the 10th day of November 2017, five (5) years since the filing of the Claim and over one (1) year after the limitation period passed.

[43] The Respondents declare that the Applicant was put on notice as to the identity of the proper party herein from February 2013, the application to add or substitute was not made until four (4) years after.

Law and Analysis

[44] Rule 19.4 of the CPR provides special provisions for adding or substituting parties after the end of the relevant limitation period. Rule 19.4 states: -

> *"(1) This rule applies to a change of parties after the end of a relevant limitation period.*
>
> *(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.*
>
> *(3) The addition or substitution of a party is necessary only if the court is satisfied that –*
>
> *(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;*
>
> *(b) the interest or liability of the former party has passed to the new party; or*

> *(c) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant."*

[45] In the case of **Caribbean Development Consultants v Lloyd Gibson** (unreported), Supreme Court Jamaica, Suit No. CL. 323 of 1996, judgment delivered the 25th day of May 2004 the Honourable Mr. Justice Bryan Sykes (as he then was) considered the nature of this rule. He stated as follows at page 7: -

> *"Rule 19.4 deals with a change of parties after the end of the limitation period, not spelling errors. The error in this rule is misidentification. This can arise in two ways: the first where party named is really "A" but you think he is called "B". In this case the right person is before the court but under the incorrect name. The second is where one intends to sue the person who committed a particular tort (for example) but you identify the wrong person completely. To put it another way "C" is named as the tortfeasor but the real tortfeasor is "D". Any correction of these types of mistakes will always lead to a change of parties. This is why the opening words of rule 19.4 say: the rule applies to* ***change of parties after the end of a relevant limitation*** *period. The change of party is either to add a party to the proceedings or to substitute another party for one who is presently before the court."*

[46] The Honourable Mr. Justice Sykes further opined at page 7 that: -

> *"I am convinced therefore that paragraphs (a), (b) and (c) of Rule 19.4 (3) are to be read disjunctively. A person may satisfy all three or any one."*

[47] In considering the above dicta in conjunction with the factors of rule 19.4 (3) of the CPR, I am convinced that Rules 19.4 (1) and (2) are applicable to the instant case. An applicant is at liberty to decide to select which sub-rule to rely on. I will say at this juncture that Rule 19.4 (2) (a) is not in issue as both parties are ad idem that the relevant limitation period was current when the proceedings were started. The issue rests on the interpretation of Rule 19.4 (3) and its correct application to the facts of the instant case.

[48] An example of an application of an equivalent Part 19.4 (3) provision in the United Kingdom is demonstrated in the case of **Horne-Roberts v SmithKline Beecham plc and another** (supra). In this case the claimant had been vaccinated with MMR vaccine. His case was that due to the defects in the

vaccine he became autistic. At the time MMR vaccines were manufactured by three pharmaceutical companies, which were Smithkline Beecham, Merck and Aventis Pasterur MSD Ltd. The solicitors acting for the claimant had notes to enable them to identify the manufacturer of the vaccine by reference to a batch number. The person within the firm correctly identified the batch number which should have indicated that it was manufactured by Smithkline Beecham, however as a result of some mistake the proceedings were brought against Merck on the 25th day of August 1999. By the time the error was discovered the limitation proceedings had expired and fresh proceedings could not be commenced against Smithkline Beecham. The solicitors therefore applied to substitute Smithkline Beecham for Merck. The Court of Appeal held that the test is whether the intending person to be substituted can be identified by reference to a description which is specific to particular case, for example, landlord, employer, owner etc. If this is so, the court will find that the claimant always intended to sue that person and that the court should have the power to substitute that person or the party who was named in mistake for that party.

[49] In the case of **Evans Constructions Company Limited v Charrington & Company Limited** [1983] QB 810, the tenant sought a new lease and served a notice. The notice named the former landlord not the current landlord. Donaldson LJ stated at page 821: -

> *"…it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in making any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in light of all the surrounding circumstances."*

[50] The Honourable Mr. Justice Sykes in considering the analysis of Donaldson LJ stated at paragraph 31 of the judgment of **Elita Flickinger v David Preble and Xtabi Resort Club & Cottages Limited** (supra) that: -

> *"…the key is to find the intention of the party making the mistake. The next question is, "What do you look at to determine the intention of the person making the mistake?"*

[51] In **Elita Flickinger v David Preble and Xtabi Resort Club & Cottages Limited** (supra), the claimant brought an action against two defendants for negligence. The defendants were described as the owner and occupier of a hotel premises at Negril. The defendants admitted that they were owner and occupier in their defence. The claimant amended her statement of case on a number of occasions. In 2001, the defendants sought permission to file an amended defence in which they admitted that the 1st defendant was the manager of the hotel but that neither the 1st or the 2nd defendant owned or occupied the hotel. The claimant sought to amend the claim form pursuant to CPR 20.6 to correct the name of the 2nd defendant from Xtabi Resort Club and Cottage Limited to Xtabi Resort Limited. Counsel for the defendant opposed the application on the basis that the application was for a change of party "masquerading as a correction of name". The affidavit supporting the application did not state whether the original 2nd defendant Xtabi Resort Club and Cottage Limited was an existing company. However, the Honourable Mr. Justice Sykes treated it as such for the purposes of the application. The submission of counsel for the defendant was rejected and the Judge found that the application was one to correct the name

[52] This principle was underscored by Lloyd LJ in the case of **The "Sardinia Sulcis**" **and "Al Tawwab"** [1991] 1 Ll R 201 sated at page 207: -

> *"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 so 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 intending to be sued was the plaintiff's employers. In **Evans v Charrington** it was the current landlord. In **Thistle Hotels v MC Alpine** 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 the 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."*

[53] In my judgment, considering these principles against the circumstances of the instant case, the Applicant intended to sue her employers and there is no doubt as to who she intended to sue.

[54] The Respondents also submit that the Claim against V.R.L. Management Limited and BRL Limited is statute barred and the amendment should not be allowed as it would deprive them of their limitation defence. I am mindful of the dicta of Scrutton, L.J. in the case of **Mabro v. Eagle Star and British Dominions Insurance Co. Ltd.** [1932] All E.R. 411 at page 412 where he said: -

> *"In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence".*

[55] However, considering the circumstances of the case at bar, I am persuaded by the dictum in the case of **Barton, Ramon & Wilburn Barton v John McAdam, et al** (unreported), Supreme Court Jamaica, Case No. C L 1996 B 110, judgment delivered the 24th day of May 2005.

[56] At page 8 of that case, the Honourable Mrs. Justice Sinclair-Haynes (Ag) (as she then was), in considering whether to allow an amendment, referred to the following dictum of Dyson LJ in **Parsons & Anor v George & Anor** (2004) EWCA Civ. 912 at page 9: -

> *"…there are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after expiry of the relevant limitation period. A common example of such a case is where the [Claimant] has made a genuine mistake and named the wrong defendant, and where the correct defendants have not been misled and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence)."*

[57] In my view, the Applicant in the instant case was genuinely mistaken that Superclubs International Limited was her employer and she provided evidence of

the mistake. I find that the instant case is disguisable from the case of **American Leisure Group Limited v Olswang LLP** (supra) cited by Learned Counsel for the Respondents. In the latter case, the claimant dragged its feet at all stages of the proceedings and further, the claimant failed to comply with the pre-action protocol and there was no correspondence which preceded the issue of the claim form against the defendant.

[58] By contrast, the Applicant in this case provided evidence that it was a pre-action correspondence from an agent of Superclubs International Limited that led her to believe that it was her employer. Though I find that reasonable investigations could have revealed the correct identity of her employer or employers, it was an error nonetheless. Notwithstanding that the Applicant would have been aware of the error from the filing of the Defence, approximately five (5) years ago, I do not find that the imprudent action of proceeding against Superclubs International Limited put the circumstances outside of the mistake envisaged by Rule 19.4. Liability always resided with her employer(s) and no injustice would be done by requiring the parties who answers this description, in this case, V.R.L Management Limited and BRL Limited to be substituted.

Will V.R.L Limited and BRL Limited be prejudiced should they be substituted in the Claim?

[59] The Applicant submits that neither V.R.L Management Limited nor BRL Limited would be prejudiced if they were to now be substituted as Defendants in the Claim. They had knowledge of the Applicant's Claim and knew that she was targeting her employer. Their knowledge is evidenced by the Affidavit of David Kay in which he said at paragraph 2: -

> *"I am the Vice President of Corporate Finance of Superclubs Group of Companies which include Superclubs International Limited, V.R.L. Management Limited and BRL Limited…"*

[60] Learned Counsel for the Applicant cited the case of **Mitchell v Harris Engineering Company Limited** [1967] 2 All ER 682 in support of his

submission. He indicated that knowledge by the proposed defendant to be substituted in that case appeared to have been a "dispositive" factor for the court to substitute a defendant after the end of the relevant limitation period. The relevant facts of this case is that the plaintiff intended to sue his employer for injuries he sustained in the course of his employment. He named H.E. Co. as the defendant. A junior solicitor checked the English company registry and found that there was a company named H.E. (Leeds) Ltd and simply inserted Leeds before filing the writ. H.E. Co. was a company registered in Northern Ireland and H.E. (Leeds) Ltd was registered in England. The plaintiff's employer was the Northern Ireland company. The error was discovered after the limitation period expired and the claimant applied to substitute the correct defendant which application was opposed on the basis that it was in effect a substitution of a new party who would be deprived of the limitation defence.

[61] Learned Counsel for the Applicant indicates that the application came under Rule 20 of the English Rules which is similar to our Rule 20 of the CPR and indicated that the court upheld the substitution. Learned Counsel cited Lord Denning at page 686 as follows: -

> *"The master and the judge thought that the amendment should be granted: and I agree with them. It is a very proper case for amendment. It was a genuine mistake by the plaintiff's solicitors: and the secretary of the two companies must have realized it as soon as he read the writ and the indorsement.*
>
> *I can well understand the defendants taking the point. They thought that the claim was so shadowy and so stale that it would be a good thing to stop the action at the outset; but the point is not a good one. They must fight the case on the merits."*

[62] The opinion of Russell LJ at page 688 was also cited by Learned Counsel as follows: -

> *"The amendment sought involves the correction of the name of the defendant, albeit that it is alleged, and correctly so, that it also involves the substitution of the Irish company for the Leeds company. Moreover, there was in my view a genuine mistake by the junior clerk on the facts stated, though it is true that with a greater degree of diligence, and*

> *perhaps with a lesser degree of self reliance, he would not have made it. It is suggested that mistake here means error without fault: but I do not see why the word should be so narrowly construed. It was not misleading, because when the writ was served, it was served on Mr Buteaux, secretary to both companies, who could not have failed to observe, since the accident alleged was at the Irish company works, that the Irish company was intended to be the defendant. Moreover, the mistake did not mislead the Irish company into thinking it was clear of liability on August 27, 1966. It would have thought so (if at all) without the mistake."*

[63] The Applicant submits that she will suffer greater prejudice as she would be deprived of the opportunity of having her Claim determined on the merits.

[64] The Respondents aver that allowing the substitution of V.R.L. Management Limited and BRL Limited would be highly prejudicial at this stage in light of the fact that the Applicant was notified of the proper party at a time that the limitation period was still relevant. Further, V.R.L. Management Limited as the proper party would be prejudiced in light of the interest that would accrue due to the delay. Additionally, there is a great likelihood that it would be unable to put forward a defence with a real prospect of success when so much time has passed and witnesses cannot be located.

[65] Learned Counsel for the Respondents submits that if the Court accepts the Applicant's assertion that BRL Limited is her employer, it would be a waste of time and resources and it would be prejudicial to V.R.L Management Limited to add it to the proceedings if it is not the proper party. The Applicant should therefore prove that she is either employed to V.R.L. Management Limited or BRL Limited. I find this submission contrary to the averment in the Defence that the Applicant is employed to V.R.L. Management Limited.

[66] The Respondents further maintain that in any event, BRL Limited is a not a proper party herein and would be unduly prejudiced as it was not, at any material time, in ownership, occupation and/or control of the premises referred to as Breezes Resort & Spa Trelawny.

Law and Analysis

[67] I agree with the submissions of Learned Counsel for the Applicant and I adopt the dicta of Lord Denning and Russell LJ at pages 686 and 688 respectively of the judgment of **Mitchell v Harris Engineering Company Limited** (supra). V.R.L. Management Limited and BRL Limited have a connection to the Defendant already pleaded and were not misled as to who the Applicant intended to sue. Therefore, should V.R.L. Management Limited and BRL Limited be substituted in the Claim, the amendment would not cause any prejudice to both companies.

[68] Superclubs International Limited in its Defence admitted that V.R.L. Management Limited is the employer of the Applicant. Checks at the Companies Office of Jamaica by the Applicant's Attorney-at-law revealed that BRL Limited owns Breezes Resort & Spa Trelawny and would therefore, at this juncture, fit the description of the Applicant's employer. Whilst this is denied on the case of the Respondents, the issue cannot be decided only on the pleadings before the Court at this juncture. Necessary documentation along with oral evidence are needed to answer the question of who the Applicant's employer is, and is one that should be determined on the merits.

[69] The only prejudice that will be suffered by V.R.L. Management Limited and BRL Limited is the loss of their limitation defence as indicated previously. I am again guided by the dictum of the Honourable Mrs. Justice Sinclair-Haynes (as she then was) at page 7 of the case of **Barton, Ramon & Wilburn Barton v John McAdam, et al** (supra). The Honourable Mrs. Sinclair-Haynes indicated that: -

> *"it is settled law that the loss of a limitation defence is not an aspect of prejudice that the court should take into consideration."*

[70] I also adopt the dicta of Lord Denning at page 686 in **Mitchell v Harris Engineering Company Limited** (supra) in which Lord Denning opined: -

> *"Some of the judges in those cases spoke of the defendants having a "right" to the benefit of the statute of limitation and said that that "right" should not be taken from him by amendment of the writ; but I do not think that was quite correct, the statute of limitation does not confer any right on the defendant. It only imposes a time limit on the plaintiff…there is nothing in the statute, which says that the writ must at that time, be perfect and free from defects. Even if it is defective, nevertheless the court may, as a matter of practice, permit him to amend it, once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by the statute."*

[71] I have considered the overriding objective in this matter and I am of the view that the degree of prejudice will be greater to the Applicant if V.R.L. Management and BRL Limited are not substituted. I therefore find that V.R.L. Management and BRL Limited should be substituted in the Claim after the relevant limitation period as Superclubs International Limited was named in the proceedings by mistake for both companies. Further, the Claim cannot properly be carried on unless V.R.L. Management and BRL Limited are substituted as the Defendants.

Whether permission ought to be granted to serve the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein out of the jurisdiction on BRL Limited

[72] Consequent upon substituting BRL Limited as a Defendant in the Claim, I must consider making an order for service of the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein out of the jurisdiction on the company since it is incorporated in the Cayman Islands and registered to do business in Jamaica.

[73] In my judgment, service out of the jurisdiction is justified in this matter as the Claim falls within the ambit of rule 7.3 of the CPR, as is required by rule 7.5 of the CPR. Rule 7.3 of the CPR deals with circumstances where the court may permit service of the claim form outside of Jamaica. Learned Counsel for the Applicant relies on Rule 7.3 (2) (c) of the CPR which reads: -

"A claim form may be served out of the jurisdiction with the permission of the court where-

(a) ……..

(b) ……..

(c) a claim is made against someone on whom the claim form has been or will be served, and-

(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim;"

[74] Mustill LJ in the case of **In Re ERAS EIL Actions**, Times Law Reports, 28 November 1991, explained the concept "a necessary and proper party" in following terms: -

"The class of necessary or proper parties to an action included persons who ought to have been joined by the plaintiff as a co-defendant or a co-plaintiff or whose presence before the court was otherwise necessary or proper…

Depending on the particular facts, that might be a question or issue arising out of or connected with the relief claimed by the plaintiff in his action. If it was, then the court had to decide whether it would be justifiable and convenient to determine that question or issue between the defendant and the non-party as well as between the plaintiff and the defendant."

[75] I have already determined that BRL Limited is a necessary and proper party to the Claim for reasons outlined herein and against the meaning outlined **In Re ERAS EIL Actions** (supra). I am satisfied from the evidence presented that there is between the Applicant and BRL Limited a real issue which is reasonable for the court to try and BRL Limited is a necessary and proper party to the case.

Disposition and Orders

[76] It is hereby ordered: -

(1) The Ruling already made with respect to how to treat with the without prejudice document on July 12, 2018 stands;

(2) V.R.L. Management Limited and BRL Limited be substituted as 1st and 2nd Defendants in these proceedings;

(3) Permission be granted for the Claimant/Applicant to serve the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein out of the jurisdiction on BRL Limited;

(4) The Defendants be permitted to file their Acknowledgement of Service and Defence within twenty-eight (28) days and fifty-six (56) days respectively after service of the Amended Claim Form and Particulars of Claim;

(5) The time for filing and serving this application on BRL Limited is abridged;

(6) Cost of this application be costs in the Claim;

(7) Parties referred to mediation to be completed within ninety (90) days of this Order;

(8) Claimant's/Applicant's Attorney-at-Law to prepare, file and serve Orders herein;

(9) Leave to appeal granted.