[2015] JMSC Civ.158

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV 06575

BETWEEN	**CARIBBEAN PIRATES THEME PARK LIMITED**	**APPLICANT**
AND	**IRISH ROVER LIMITED**	**DEFENDANT**

Denise Senior- Smith for Claimant instructed by Oswest Senior Smith & Co.
Tameka Smith, O Gordon for Defendant instructed by Messrs Frater Ennis & Gordon.

Application to strike out – Named Claimant non-existent- Application to amend- whether name of party can be changed - Whether claim a nullity

Heard 8th May 2015, 20th May 2015, 28th May 2015 and 29th May 2015.

In Chambers

Coram: Batts J.

[1] This Judgement was delivered orally on the 29th day of May 2015 and I now reduce it to writing. There were four (4) applications before me:

a) The Claimant's Notice of Application filed on the 31st March 2014 for the striking out of the Defendant's acknowledgment of service and for abridgment of time in which to file the application. The Claimant indicated this application was not being pursued.

b) The Defendant's application filed on the 1st April 2014 for permission to file acknowledgment of service out of time, permission to file defence and counterclaim and that acknowledgment and defence and counterclaim as filed do stand. The Claimant indicated that this application was not being opposed.

c) The Defendant's Notice of Application filed on the 4th April 2014 that the Claimant's statement of case be struck out and

d) Claimant's application filed on the 4th May 2015 that the name of the Claimant be amended to read

"Leon Messam and Jane Messam T/A Caribbean Pirates Theme Park"

[2] If the Defendant's application to strike out the statement of case succeeds the matter will be at an end and no further orders will be required. It is that application on which I heard submissions. The application by the Claimant to amend was the alter ego of that application so the submissions in that regard were so to speak subsumed.

[3] The Defendant's counsel, and I hope I do her no disservice in this summary, contended that:

a) The defect in the Claimant's statement of case is such that it cannot be cured by amendment

b) This is because the named Claimant "Caribbean Pirates Theme Park Ltd" has never existed. There is no such company.

c) As a matter of public policy the matter should be struck out as it is illegal to trade in a corporate name where such a corporation does not exist. To file an action in the name of a non-existent company is to break that law and should be discouraged.

d) A claim filed in the name of a non-existent entity is a nullity that cannot be cured.

[4] The Defendant relied upon the affidavits of Tamika Smith dated 1st April 2014, 8th April 2014 and 20th May 2015. Permission to rely on the latter affidavit was expressly granted by me at the resumed hearing of that date. The Claimant relied on the affidavit of Leon Messam dated and filed on the 7th May 2015. Both parties filed written submissions. I have carefully perused the respective affidavits and submissions.

[5] Having done so I am satisfied that the Defendant's application to strike out the statement of case ought to be dismissed and that an order is to be made to amend the claim and particulars of claim by changing the name of the Claimant in the manner applied for. The Defendant's application filed on the 1st April 2014 which was not opposed will be granted.

[6] My reasons can be shortly stated. It is however out of deference to a decision of my brother Sykes J, on which the Defendant placed great reliance, that I have decided to deliver these reasons for judgment.

[7] The Civil Procedure Rules provide in rule 20 for amendments to the statements of case. Rules 19.4 and 20.6 provide for substitution of parties and amendments to the name of parties where a limitation period has passed. In such circumstances an amendment to correct a mistake as to the name of a party should only be made [rule20.6.(2)] :

a) Where the mistake was genuine and

b) Where the mistake was not one which would cause reasonable doubt as to what the party intended.

It is implicit and indeed necessarily inferential from this rule that on an application to amend in order to change the name of a party where no limitation period has passed, those limiting factors are not mandatory. In such a case reliance on the general principles will suffice.

[8] This interpretation of the rules is consistent with the overriding objective. This is because where there has been no expiration of a limitation period a party can merely refile a corrected claim to cure a defect. In the absence of prejudice, and all other things being equal, it would be a waste of court time and parties' resources, for a court to strike out an action in the full knowledge that it can be refiled with the defect corrected, the next day.

[9] In the matter before me it is conceded that there is no limitation of action time bar. The cause of action is still live. The claim can be refiled without the danger of such a defence being raised. The Defendant's counsel nevertheless wishes it struck out. They contend that as filed, the claim is a nullity and never existed. They say the claim should therefore be struck out and the order for injunction discharged. The Claimant relies primarily on the cases of Lazard Brothers v Midland Bank [1933] AC 289, Caribbean Development Consultants v Lloyd Gibson [2004] JMSC23 (unreported judgment of Sykes J (Ag) delivered on the 25th May 2004) and International Bulk Shipping and Services v Minerals and Metal Trading Corp of India (1996) 1ALL ER 1017

[10] Sykes J (acting) as he then was relied on the other two English decisions when deciding in 2004 that :

> **" ..... there cannot be a substitution of parties under rule 19.4 after the expiration of a limitation period where the original proceeding is a nullity. One of the ways in which a nullity arises is where one party to the suit is not a legal entity. CDC is not a legal entity. The original proceeding was therefore a nullity. If this amendment were allowed it would bring into existence what never existed in law".**

[11] I respectfully decline to follow that decision. In the first place there is a clear distinction between the facts of that case and the one before me. Here no limitation period has passed. So in a restricted sense the case does not apply.

[12] However on the broader question of principle I also respectfully depart from the conclusion of my brother. This is because it is rather artificial and with respect not consonant with logic to say that a claim is a nullity and hence never existed, even after there have been documents filed in response and a court ordered injunction in existence for over a year. What of the undertaking as to damages? Can the Claimant now say since the claim never existed my undertaking never did? How about costs, on what basis does a court order costs for a claim that never existed?

[13] An impugned law, regulation, decision of an inferior tribunal or court's process is presumed valid until and unless declared by a court to be void. If avoided it is most often treated as void ab initio. However there are circumstances and occasions when it may be voided prospectively or only for some purposes or not at all. As per Lord Phillips:

> "**What it all comes to is this, Subordinate legislation, executive orders and the likes are presumed to be lawful. If and when however, they are successfully challenged and found ultra vires, generally speaking it is as if they had never had any legal effect at all. Their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are**

made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders, or acts are found to have legal consequences for some at least (sometimes called "third actors") during the period before their invalidity is recognized by the court – see for example Percy v Hall (1977) QB 924. All these issues were left open by the House in Boddington"

Mossel (Jamaica) Ltd (T/A Digicel) v OUR at paragraph 44. [2010] UK PC 1 P.C. Appeal Number 0079/2009 at paragraph 44.

[14] Let me say immediately that on the facts before him the decision of Sykes J can be fully supported on other grounds. It does not seem, indeed it clearly was not, a case of an alter ego error as to identity. This is because at the time of negotiations the specific issue of the Claimant's capacity to sue was raised by the opposing party. Their legal advisers, this notwithstanding, maintained the position as to the capacity of CDC and took no corrective measure within the period of limitation. Against that background it is difficult to accept that a "genuine" error had been made. The company had several "directors" who gave instructions, and although Sykes J make no express finding it does seems that there was no clarity as to who the Claimant was or ought to have been.

[15] In the matter at bar, the claim relates to breach of contract, goodwill, detinue and conversion. The parties are private companies and / or partnerships. The Defendant was never in doubt that it was trading with Leon Messam and Jane Messam who at all times operated with or through the name Caribbean Theme Park Ltd. Such an entity had never been incorporated. However the Defendants did contract with it (or them). Further they entered an acknowledgment of service to the claim and filed and served a defence and counterclaim. These documents do the following:

a) Allege that the Claimant is not a duly incorporated company but rather is a registered business under the law of Jamaica

b) At paragraph (4) et seq says "the parties entered into the following agreements" and goes on to give a full and comprehensive response to the claim.

It is clear that in the case before me the Defendant knew who the intended claimants were and suffered no prejudice by the Claimant's error. Furthermore no applicable limitation period has as yet run in this matter.

[16] In his judgment Sykes J cited the English Court of Appeal's decision of the Sardinia Sulcis [1991] 1 L l 201. The learned judge however preferred the approach of the English court in Internal Bulk Shipping v Minerals and Metals Trading Corporation [1996] 1 ALL ER 1017; a decision which he acknowledged was given under the old Civil Procedure Rules. He also, as stated above, relied heavily on the 1933 decision of Lazard Brothers v Midland Bank.

[17] For my own part the decision in Sardina Sulcis is to be preferred and is consistent with the overriding objective.

(a)Per Lloyd J at page 205 -206:

"So the answer to the problems raised by this case depends, as so often, on finding the right starting point. In my view the right starting point is O.20, r.5 (3). If the plaintiffs can bring themselves within the provisions of that rule, the principle of Lazard Bros v Midland Bank has no application. The defendants cannot argue that the plaintiffs has ceased to exist without begging the question, in other words, without presupposing that the court will not exercise its powers to amend under O.20 r.5(3). For if the court does exercise its powers under that rule, the amendment related back to the date of the writ, and there never was a non-existent plaintiff.

If, on the other hand, the plaintiffs cannot bring themselves within O.20, r.5(3), then they must fail. For they do not seek to rely on O.2 r. 1 or O.16, r.6.It is O.20, r.5(3) or nothing.

For convenience, I set out O.20,r.5 (3):

"An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued."

The first point to notice is that there is power to amend under the rule even though the limitation period has expired: see O.20, r. 5(2).

The second point is that there is power to amend, even though it is alleged that the effect of the amendment is to add a new party after the expiration of the limitation period. But the court must be satisfied (1) that there was a genuine mistake , (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue, and (4) that it would be just to allow the amendment.

As to (1) the solicitor handling the case at Messrs. Richards Butler on behalf of their clients, KKK, was Mr. Richard Pertwee. He was, as he explains in his affidavit, relatively inexperienced at the time. He knew that Sardanavi had been incorporated into another company. But it never occurred to him, nor was it ever suggested, that Sardanavi had ceased to exist. His mistake was in assuming that Sardanavi remained the company with the right to sue in respect of the collision damage. He acknowledged that the back-dating of the memorandum of agreement should have put him

on inquiry. But as Lord Justice Russell said in Mitchell v Harris Engineering Co. Ltd., [1967] 2Q.B. 703 at p721, "mistake" in O.20,r .5(3) is not limited to mistakes without fault.

Page 207-

> **"Returning to the facts of the present case, there could be no reasonable doubt as to the identity of the person intending to sue, namely, the person in whom the rights of ownership were vested at the date when the writ was issued. That was, as Mr. Connoley says in his affidavit, the whole point of the exercise on which Messrs. Richards Butler had embarked, as the Defendants well knew. The description of the intending plaintiffs was clear enough. It follows that Mr. Pertwee's mistake was a mistake as to name, and not a mistake as to identity. I would hold that condition (3) has been satisfied".**

Page 208-

> **"But what if the amendment does not relate back, and the writ as issued was a nullity? Is this fatal to the plaintiffs' claim to amend? I do not think so. In Mercer Alloys Corporation v Rolls Royce Ltd., [1971] 1 W.L.R 1520 a writ was issued in the name of a company, which subsequently merged in its parent company, and ceased to exist. The claim was compromised and judgment was entered in the name of the non-existent plaintiff. It was argued that the judgment was a nullity, and for that reason could not be amended. The argument did not succeed. It was assumed by the Court of Appeal that the judgment was a nullity; but it was held, nevertheless, that there was jurisdiction to amend the judgment in order to give effect to the intention of the parties. The intention of the parties, there as here, was to settle the claim.**
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> **Assuming, contrary to my view, that the writ was a nullity when issued, I would have no hesitation whatever in amending the order of the court dated March 23, 1987, so as to give effect to the intention of the parties. The case would be indistinguishable from Mercer v Rolls Royce. The order of the court could then be enforced as it stands.**
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> **Mr. Bennett argued that SIT cannot take advantage of the order as it stands, because SIT cannot take advantage of the arbitration award. He referred us to The Antares, [1987] 1 Lloyd's Rep. 424 in that connection. But I do not regard this as a difficulty. As already mentioned, the submission to arbitration was signed by solicitors on behalf of the owners of the two vessels. It is true that par.1 of the agreed statement of facts states that Sardanavi were the owners of the**

Sardinia Sulcis at all material times. But this does not undermine the award. Falsa demonstratio non nocet cum de corpore constat.

For the reasons given, I would reject Mr. Bennett's first argument that the writ, and all subsequent proceedings, were a nullity. But if the writ was a nullity, it makes no difference, since the order of the court dated March 23, 1987 recording the prior compromise agreement between the parties, can be amended and enforced".

Per Stocker LJ

(b) Page 208

"**Although I agree with the whole of the reasoning of Lord Justice Lloyd I should, for my part, be content to rest my conclusion that the appeal of the defendants be dismissed on the proposition that the writ itself identifies the party intending to sue –viz the owners of the vessel Sardinia Sulcis. At all times the owners of that vessel existed. The only error (assuming it was an error) was the name of the owners. I therefore doubt if amendment of the writ was necessary save for the address – an irregularity only. It was the statement of claim which required a substitution of a different name.**

Assuming, however, that the amendment of name sought on the plaintiffs' summons was needed. It seems to me clear that the plaintiffs brought themselves within the ambits of O.20, r. 5(3) and in my view this case cannot be distinguished from the decisions of the majority of this court in Evans Constructions Co. Ltd. v Charrington & Co. Ltd.,[1983] 1 Q. B. 810 and Thistle Hotels Ltd. v Sir Robert McAlpine & sons Ltd., (transcript April 6 1989). These cases establish, as it seems to me, that a name may be corrected under O.20, r. 5(3) even though such change of name involves the substitution of a different legal entity. From the judgments of Lord Justice Donaldson and Lord Justice Griffiths in the Evans case and Lord Justice Russell and Lord Justice Mann in the Thistle case a distinction has to be drawn between the "identity" of the party suing or to be sued and the name of that party. In those cases the identity of the party was manifest from the nature of the claims. It seems to me that the reasoning of the majority in those cases applies a fortiori to the instant case where the identity of the party suing is manifest from the writ itself. The appropriate question therefore would have been, had it been asked, "what is the name of the plaintiff owners?" the answer given might have been wrong, but the correction of the name would be permitted by the terms of O.20, r.5(3) if all the other factors relevant were satisfied".

[18] Lazard Bros. v Midland Bank [1933] AC 289 on which Sykes J relied was not a case in which an amendment to pleadings was being considered or could even have been relevant. That matter concerned overseas assets of post Revolutionary Russia. The issue centred on the validity of judgments in default and garnishee proceedings in England.

The evidence demonstrated that ex parte orders for substituted service had been obtained against the Defendant, an entity that had been dissolved by the new soviet state. It had no shareholders, directors and no legal existence.There was a failure to disclose these facts in the application for substituted service and to use procedures established by law for issues involving Soviet Russia. I will read extracts from the case to demonstrate:

> Page 296-297
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> **"I shall deal first with question (2.), which is most important and is decisive, since it is clear law, scarcely needing any express authority, that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the Court that the person named as the judgment debtor was at all material times at the date of writ and subsequently non-existent: such a case is a fortiori than the case which Lord Parker referred to in Daimler Co v. Continental Tyre, &Co[1916] 2 AC 307,337.There the directors, being all alien enemies, could not give a retainer. Lord Parker said: "But when the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed"**
>
> **In such a case the plaintiff cannot be before the court. In the present case if the defendants cannot be before the Court, because there is in law no such person, I think by parity of reasoning the Court must refuse to treat these proceedings as other than a nullity".**
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> Page 305
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> **"In my judgment the conclusion is now inevitable that the Soviet Embassy were substantially right in the statement which they made by their letter of November 27, 1930, in returning the writ in this action that it "could not be delivered to the addressee in view of the fact that the Banque Industrielle de Moscou went out of existence during the course of the 1917 October Revolution**".
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> Page 306
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> **"This conclusion is sufficient without more to carry with it the result that the writ, the judgment and the garnishee proceedings must be held of no effect and be set aside. But I desire to deal with the other question which has reference to the service of the writ. There is perhaps some artificiality**

in now discussing this question, since to do so it must be assumed that the Industrial Bank had some sort of existence, that it was something which might well be called nominis umbra: it clearly has no address, no shareholder, no directors, no tangible or discernible existence. How such a disembodied spirit could be served might appear to present a serious problem. That problem was however grappled with in an affidavit sworn on behalf of the appellants, dated October 24,1930,in order to support an application for leave to serve notice of the writ on the Bank "by sending the same by registered post to the intended defendants at Moscow" The affidavit did not venture to suggest that the intended defendants had any address in Moscow or that there was the slightest probability that such a letter would reach the Bank, which was described as a "company registered in Russia". The affidavit did indeed say that the whereabouts of any directors or other persons who in 1917 had been entitled to sign for the Bank were unknown, and that all of them, according to the deponent's information and belief, "had been deprived of their powers of representing the intended defendants by decrees of the Russian Government"

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"The Court has discretion to set aside an order made ex parte when the applicant has failed to make sufficient or candid disclosure. I think in this case there was sufficient ground to call in play the discretion of the Court to set aside the order for service and justify the Court in refusing in the exercise of its discretion to treat the judgment as a sufficient foundation for a garnishee order as in the case suggested by Viscount Cave L.C. in the Sedgwick, Collins case. (1) In particular the words "the intended defendants are domiciled in Russia" may be most misleading, even if no intention existed to mislead. What is suggested is a "domicil"- an address where but for other difficulties personal service could be effected, and a suggestion is implied that the method of service might fairly be expected to bring to the proposed defendants the notice of the writ. Even if the Bank existed, it must have been known that it existed as a mere shell, incapable of action or of being affected with notice."

Page 308

"If the procedure under Order XI. r 8,had been employed, there would, according to the usual course, have been an official certificate or declaration transmitted through the diplomatic channel by the Soviet Government to the English Court, reporting the impossibility of service much to the same effect as was done in the letter from the Soviet Embassy of November 28, 1930, and if on that a request was made for substituted service under Order XI., r 8, sub-rr 4 and 5, the judge would then have had the true position before him to enable him to decide how to act. .....

The result is that, quite apart from the want of accuracy in the affidavit, the order for substituted service was made by an incompetent procedure and was a nullity".

It is manifest that the Lazard Brothers case and the reason why the proceedings were declared a nullity, is easily distinguished from the facts before me. In any event the question whether under the rules an amendment ought to be granted did not and could not have arisen in that case.

[19] The other decision of **International Bulk Shipping v Minerals & Metals Trading [1996] 1 ALL ER 1017** insofar as it considered the power to amend turned on a fine point of distinction. The court held that an amendment to correct a mistake as to the name of a person was not possible where there was no error in the identity. In that case it was the clear intent to sue on behalf of the company not the trustees. The decision of the court to refuse the amendment was not based on a finding that the proceedings were a nullity. Presumably the amendment would have been allowed had the court found a "genuine" mistake as to the named plaintiff. See per Evans LJ

Page 1025(c)

"if the need for the application arises because, mistakenly, the wrong person was named as plaintiff in the writ, or the right person was wrongly named, then the court has power to correct the mistake under Order 20, r5, which is the separate application made here. When that is the appropriate order to make then the fact that the action may be a nullity is not relevant and the fact the limitation period has expired does not prevent the order being made."

Page 1026(b-h)

"These authorities have established that a distinction must be made, in accordance with the wording of the rule, between the identity of the person intending to sue and the name of the party. A mistake as to the latter can be corrected, but as to the former not. In the Sardinia Sulcis and Al Tawwab [1991] 1 Lloyd's Rep 201 at 207 Lloyd LJ, with whom Stocker LJ (at 209)expressly agreed, suggested that the test is "can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case – eg. landlord, employer, owners or ship-owners?" if the answer is yes, then an amendment can be allowed even where the correction 'involves substituting a different name altogether, and the name of a separate legal entity' even though this may be equivalent to substituting a new party.

It was also established in The Aiolos that, as the judge put it, 'where there is no mistake either as to the name of the plaintiff or as to the identity of the party intending to sue but only an error as to the rights of the correctly identified party', the rule does not apply (citing Oliver LJ in that case [1983]

2 Lloyd's Rep 25 at 30). 'Then, having referred to the evidence, the judge concluded:

> **'in the present case it has not been established to my satisfaction that the intention of either Mr. Kruger or Mr. Pople [the trustee's English solicitor]was to sue in the name of the bankruptcy estate of Himoff. It is true that their intention was to sue for the benefit of that estate but that is an entirely different matter. To sue for the benefit of the Himoff estate, it was still necessary to decide who were the proper parties to sue to enforce the award. The decision was taken to sue in the names of the disponent owners, contracting parties and parties to the award. As those parties were correctly named, I cannot find that Mr. Kruger and Mr Pople intended to sue in any other names. No doubt had Mr. Kruger and Mr. Pople known that IBSSL and Himoff had ceased to exist, then some other decision would have been taken. But, whatever that decision would have been, it would have been a decision as to the proper party or parties to sue to enforce the awards and not a case where A was named instead of B as plaintiff to the action'**

Page 1026 (j)

"**When it is said that the wrong plaintiff has been named this must be taken as a reference to the intention of the person who caused the writ to be issued, rather than of the person in fact named. Those persons in the present case were the trustee and his legal advisers. They intended that the plaintiffs should be the companies rather than the trustee or the bankruptcy estate. They were mistaken into thinking that the companies were still in existence and entitled to sue"**

Page 1027 (a) – (c)

"But that was a decision as to who the plaintiffs should be, and no doubt for good reasons they chose to assert the companies' rights under the awards, rather than whatever rights the trustee or bankrupt estates had required.

The rule envisage that the writ was issued with the intention that a specific person should be the plaintiff. That person can often but not invariably be identified by reference to a relevant description. The choice of identity is made by the persons who bring the proceedings. If having made that choice they use the wrong name, even though the name they use may be that of a different legal entity, then their mistake as to the name can be corrected. But they cannot reverse their original identification of the party who is to sue.

> **This interpretation of the rule derives not only from the phrase "correct the name of a party" but also from the requirement that the mistake must not have been such as to cause any reasonable doubt as to the identity of the person intending to sue".**

[20] Whereas one may be concerned that these fine distinctions apply in the context of the new approach to civil proceedings, it is manifest that International Bulk Shipping did not decide that "nullity" of process was a bar to amendments to change the name of a party under the English equivalent of our CPR rule 20.6(2) .Sykes J did not have the benefit of other **cases cited to me. In particular Signet Group Plc v Hammerson UK Properties Limited [1997] EWCA Civ 293** decided 9th December 1997 by Woolf MR, Merrit and Weller LJJ. In that case an amendment was granted to correct the name of the party suing even although a limitation period had passed. The amendment was granted and because it related back to the date of filing the limitation defence did not arise. There was no issue of "nullity" in that case as the original but erroneous Claimant was an existing entity. The court found that the Defendants were never misled and had no doubt of the identity of the person intending to sue. Lord Wolf MR ended his judgment thus,

> **"The point taken by Hammerson was technical and without merit. It is a relief to find that even under the present rules the court can ensure that technicality does not prevail where justice requires a dispute to be decided on its merits".**

[21] Neither did Sykes J have the benefit of **Gregson v Channel Four Television Corporation [2000] ALL ER (D) 956 .** In that case it was the Defendant (a dormant company) that was mistakenly named. The Claimant was allowed to amend the claim, it having been considered by the Defendant that the mistake was not such as to cause reasonable doubt as to the identity of the party in question. This was done even after a limitation period had expired.

[22] Justice Sykes relied in his judgment on the **Junior Doctors Association v Attorney General (2000)** JMCA 3 (unreported Court of Appeal 12 July 2000). In that matter the Court of Appeal decided that a claim brought in the name of a non-existent entity was a nullity and as a result set aside an ex parte order made below. Notwithstanding some strong language emanating from the court, there was not before that court an application to amend or to substitute the name of a party. The decision is really therefore not applicable or relevant to the point I have to decide. Furthermore that case was decided under the old Civil Procedure Code and at a time when it may be said form was often more important than substance. So that with reference to what was then section 678 Langrin JA, relied upon a distinction between an irregularity and an illegality. The latter he said resulted in a nullity and fell outside the rule as it could not be cured.

[23] Such distinctions find little place in the context of the "new" Civil Procedure Rules. Its primary purpose is to achieve substantial justice and to move away from technicality and formalities which stand in the way of fair hearings. Efficiency and expedition is what is required and the rules are to be construed in a manner which promotes these aims.

[24] In this regard it is manifest that in this case a genuine mistake was made. The Defendant was not misled by that mistake firstly because the particulars of Claim state that the

directors were also the owners and they both signed the claim as such. Secondly because the subject matter, context and the statements of case filed in the claim meant there was never any doubt as to who had contracted with whom. No limitation period has passed and there is no prejudice to the Defendant if the amendment is granted. On the matter of public policy and alleged illegality, I do not think that to file an action in the name of a non- existent company is to trade or carry on business and there is no evidence nor could there be in the circumstances of this case that there was any intent to deceive or defraud. Finally the Defendant has taken active steps in the action. Unless set aside or struck out by this court the action remains alive and well. There is in place an injunctive order which has to be obeyed. Amendments relate back to the date of filing. It would therefore be artificial, and in my view wrong to declare these proceedings a nullity.

[25] I therefore decided to exercise my discretion and grant the amendment as prayed. This will relate back to the start of the proceedings. The CPR in any event expressly contemplates a court giving such orders or making such directions as to cure any defects in procedure (CPR Rule 26.9(3)).

My orders therefore on the applications before me are as follows:

1. Defendants Notice of Application filed on the 4th April 2014 is dismissed with costs of the hearing to the Claimant to be taxed or agreed.

2. Claimant's application to amend the Claim and Particulars of Claim is granted so that the name of the Claimant is amended to read "Leon Messam and Jane Messam T/A Caribbean Pirates Theme Park". Costs thrown away in consequence of the amendment to the Defendants to be taxed if not agreed.

3. Defendants application filed on the 1st April 2014 is granted so that:

    a) Permission is granted to the defendants to file an acknowledgement of service out of time.

    b) Permission is granted to file a defence and counter claim out of time.

    c) The acknowledgment of service filed on the 11/5/14 and the defence and counter claim filed on the 11/4/14 to stand.

Defendants counsel to prepare, file and serve formal Order.

David Batts
Puisne Judge