[2021] JMSC Civ 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02143

BETWEEN	**YENNEKE KIDD**	**CLAIMANT**
AND	**JUICI BEEF LIMITED (T/A JUICI PATTIES)**	**DEFENDANT**

IN CHAMBERS (VIA ZOOM)

Mr Matthew Royale instructed by Myers Fletcher & Gordon Attorneys-at-law for the Defendant/Applicant

Ms Kimmika Hibbert instructed by Green & Co Attorneys-at-law for the Claimant/Respondent

Heard: October 14, 2020, November 4, 2020 and January 19, 2021

Civil Procedure - Application by Defendant to be removed as defendant in the claim and for a company not associated with the Defendant to be named as defendant instead – Can a Defendant remove itself from a claim and seek orders for an unrelated company to be named as the defendant instead - CPR 19.4(3) and CPR 20.4(2)

MOTT TULLOCH-REID, MASTER

INTRODUCTION

[1] On September 18, 2019 the Defendant applied to the Court for the following orders:

a. Permission be granted to the Applicant to file an Amended Defence within seven days of the date hereof.

b. Elite Restaurants Limited, a company duly incorporated under the laws of Jamaica with registered offices at 96c Molynes Road, Kingston 20 in the parish of Saint Andrew be substituted in the place of the Applicant as the Defendant in the claim herein.

c. Costs to the Applicant.

The application is supported by the Affidavits of Romona Morgan, an Attorney-at-law in the Defendant's company, which was also filed on September 18, 2020 and an Affidavit of Alyssa Chin, which was filed on October 13, 2020, one day prior to the hearing of the application. Ms Chin swore the Affidavit in her capacity as Director of the Defendant.

[2] The grounds on which the application is being sought are as follows:

a. The Defendant has never been in possession or control of the premises where the personal injuries were allegedly sustained.

b. Elite Restaurants Limited was at all material times the occupier of the premises where the personal injuries were allegedly sustained.

c. The court is empowered to grant the orders pursuant to CPR 19.4(3) and CPR 20.4(2)

d. The Defendant would suffer significant prejudice if the orders sought herein are not granted, the Respondent is unlikely to suffer undue prejudice.

[3] The Claimant objects to the application and having been served with Ms Chin's affidavit at the eleventh hour, sought an adjournment after the matter had already begun, as she needed an opportunity to respond to Ms Chin's affidavit.

BACKGROUND

[4] I believe it is important to set out the background of the case because it to some extent has impacted my decision.

Chronology of events

i. Claim Form and Particulars of Claim filed on April 15, 2015 naming Juici Beef Limited (t/a Juice Patties) as the Defendant.

ii. Acknowledgment of Service filed on June 3, 2015 stating that the Defendant's name was properly stated on the Claim Form and setting out an intention to defend the claim fully. Acknowledgment of Service was filed by Knight, Junor & Samuels.

iii. Defence filed on July 2, 2015 by Knight Junor Samuels admitting paragraph 2 of the Particulars of claim which reads as follows:

> *"The Defendant at all material times is a company duly incorporated under the laws of Jamaica registered under the laws of Jamaica and is and were [sic] at all relevant times* ***occupier's [sic] of premises situate 31C Constant Spring Road in the parish of Saint Andrew****…. "(my emphasis)*

The certificate of truth in the Defence is given by Attorney-at-law, Mr Bert Samuels, of Knight Junor & Samuels who in his certificate says that the Defendant certifies that the facts set out in the Defence are true to the best of their knowledge, information and belief and that the certificate is given on the Defendant's instructions.

A full defence as to the safety of the premises including the door which is the issue of contention is set out in the defence.

iv. The matter was referred to mediation and the parties attended mediation on March 7 or 9, 2016. I am uncertain as to the exact date in March as the mediator's handwriting is not clear. The mediator's report was filed on April 5, 2016 and it is noted thereon that the parties met, but were unable to arrive at an agreement.

v. The parties were then invited to attend a Case Management Conference.

vi. The Defendant then made an application for court orders for summary judgment or to strike out the Claimant's case. This was filed on March 15, 2016 and supported by an affidavit of Bert Samuels also filed on the same date. The basis of the application is that the Claimant's claim discloses no negligence on the Defendant's part or breach of statutory duty. The Claimant objected to the application.

vii. The application was heard by Justice Lorna Shelly-Williams on April 5, 2017 and the orders sought were refused. Case Management Conference orders were then granted.

viii. The parties then proceeded to comply with the Case Management Conference directives and in fact on June 5, 2019, the Defendant made another application but this time seeking an extension of time within which to file and serve its witness statements.

ix. On September 18, 2019 the Defendant indicated to the Court that it had changed its attorneys-at-law and filed the application that is now before the Court.

x. It is to be noted that at the Case Management Conference the trial date was set for November 25-27, 2019. Those trial dates had to be vacated because of this application.

The Defendant's case

[5] The evidence of Ms Romona Morgan on behalf of the defendant is that its former attorneys-at-law had filed a defence on July 9, 2015 (see paragraph 5 of the affidavit) but that the applicant subsequently noticed that the defence had significant deficiencies in that it admits erroneously that the defendant was occupying the premises when the defendant had neither had possession nor control of the premises and that the defence does not disclose that Elite Restaurants Company Limited ("Elite") was the occupier of the premises at the

time having entered into a franchise agreement with the Defendant (see paragraph 6 of the affidavit). She then laments the prejudice that will be caused to the Defendant if the amendment is not allowed.

[6] Ms Alyssa Chin's affidavit supports Ms Morgan's. She sets out details of Elite as being a limited liability company which is active. She refers to a Franchise Agreement between Elite and the Defendant wherein the Defendant permitted Elite to manage its business under the Juice Patties Brand. The Franchise Agreement was not exhibited to the Affidavit as Ms Chin stated that since it was entered into in 2002, it has been misplaced. She has however exhibited correspondence between the Defendant and Elite which would suggest that there exists such a franchise agreement.

[7] At paragraph 8 of her affidavit, Ms Chin says that the franchise operates at 31C Constant Spring Road in the parish of Saint Catherine, which I might add, is the same place that the Claimant alleges the incident occurred. She says at paragraph 9 that Elite operated its Juici Patties branded restaurant business at that location through a lease between it and Chevron Caribbean SRL. At paragraph 11 her evidence is that the franchise agreement was terminated on November 1, 2013. The incident is alleged to have taken place in 2011 when the franchise agreement would still have been current.

The Claimant's case

[8] Ms Latoya Green swore an Affidavit in support of the Claimant in response to Ms Chin's affidavit. She highlighted the fact that the Defendant had admitted in its defence to being the occupiers of the premises and in the acknowledgment of service had stated that its name was properly noted on the initiating documents. The Claimant could not speak to the franchise agreement or matters ensuing therefrom as that was not in her knowledge as she put the defendant to strict proof of same. Of note, Ms Green states that when the Claimant entered the premises

the name she observed was “Juici Beef Patties” and that is why she named Juici Beef Patties as the Defendant.

The Defendant’s submissions

[9] The defendant’s submissions are contained in written submissions filed in a bundle on February 28, 2020. On November 4, 2020, the defendant filed submissions in reply to the claimant’s authorities. Counsel, Mr Royale, also made oral submissions on behalf of the defendant, which were not outside the scope of the written submissions. The jist of the submissions are:

a. As it relates to the application to amend defence:

   i. It would be just to allow the defendant to make the amendment

   ii. If the error is not fraudulent or intended to overreach the court ought to correct it since the court exists for the sake of deciding matters in controversy not to discipline (see paragraph 12 of the written submissions)

   iii. Amendments are to be allowed so that the real dispute between the parties can be adjudicated on (see paragraph 13 of the written submissions)

   iv. When a litigator or his advisor makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party (see paragraph 15 of the written submissions)

   v. The error in pleadings was made by the defendant’s previous attorneys-at-law and the defendant should not be punished for their attorney’s mistake.

b. As it relates to the application to substitute party:

i. The defendant relies on CPR 19.4 to support its position that the Court may make an order to substitute a party where the substitution is necessary and the limitation period was current when the proceedings started. The defendant then refers specifically to CPR 19.4(3) which indicates that the new party is to be substituted for a party who was named in the claim form in mistake for the new party. The Defendant then refers to the cases of **Elita Flickenger v David Preble et al Suit No CL F 013 of 1997, Evans Construction Co Ltd v Charrington & Co Ltd [1983] 1 All ER 310, SmithKline Beecham Plc v Horne Roberts [2001] EWCA Civ 2006** and **Ramon Barton v Wilburn Barton Claim No CL 1996 B 110** where successful applications were made by the claimants in the cases to substitute a defendant (see paragraphs 30 to 36 of written submissions). The cases all outlined the same principle of law which is to be followed when amendments outside of the limitation period are being sought. Although I read all the cases and considered them, I will only address the principle of law as outlined in two of the cases, which will be discussed in my analysis below.

ii. At paragraph 39 of the written submissions the Defendant submits that it was never the occupier of the location but the location was occupied by Elite Restaurants Limited and as such it is Elite Restaurants Limited which should have been named as the defendant as it is that company which the claimant had intended to sue from the beginning.

The Claimant's submissions

[10] Ms Hibbert sets out he chronology of events as I have set them out in paragraph 4 above. She submits on behalf of the Claimant that throughout the years, the Defendant has "maintained a strong and confident posture that they were the occupiers of the premises" (paragraph 12 of the submissions). If that was not the

case, she continues, the Defendant ought not to have filed a defence admitting that it was at the material time the occupier of the premises and maintained that position all the way through to a case management conference where a trial date was given. She says the Defendant should have known from the outset that it was not the proper party to be sued, that it was not the occupier of the premises at the time of incident and should have filed a defence to that effect. Instead, the defendant unsuccessfully applied for summary judgment which was a contested application on the basis that the Claimant had no real prospect of bringing the case successfully, not on the basis that the Defendant was not the proper person to be sued. Further, Ms Hibbert argues that the Defendant has offered no evidence to prove the existence of a franchise agreement with Elite. She says that if the Defendant is allowed to amend its defence at this late stage of the game, that would be unjust to the claimant who has expended time and resources in bringing the matter to this stage of the court proceedings. It was also argued that a trial date what was set for 2020 had to be abandoned and the claimant will now have to wait an additional 4 years for her matter to be heard.

[11] As it relates to the substitution of Elite as a party, the Claimant simply says that the Defendant cannot tell the Claimant who she is to sue and that the cases of **Elita Flickenger, SmithKline Beecham and Evans Construction Co Ltd** all concerned applications made by claimants to substitute the wrongly named Defendant. None of the cases concerned a defendant seeking to amend the claim form to substitute a defendant.

Analysis

[12] CPR 19.3 (1) to 19.3(2) provide as follows:

> *"(1) The court may add, substitute or remove a party on or without an application.*
>
> *(2) An application for permission to add, substitute or remove a party may be made by –*
>
> *(a) an existing party; or*

(b) a person who wishes to become a party.

(3) An application for an order under rule 19.2(5) (substitution of new party where existing party's interest or liability has passed) may be made without notice but must be supported by evidence on affidavit."

CPR 19.2(5) provides

"The court may order a new party to be substituted for an existing one if –

(a) the existing party's interest or liability has passed to the new party;

or

(b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

The Defendant wishes for an order that it be removed as a party and Elite substituted as defendant in its stead. The court can make that order if the existing party's liability has passed to the new one. This is not the case in the claim before me. The court can also make the order for substitution of a party if it is felt that the court can resolve the matters in dispute more effectively by substituting the new party for the existing party. If I had the franchise agreement, I would be in a better position to make that determination. Although the Defendant has put forward documents to suggest that there was indeed a franchise agreement, I would need to see the agreement itself to see what was agreed between the parties and so determine on a balance of probabilities if, by virtue of the terms of the franchise agreement, Elite is to be named as the Defendant in this claim. This is especially so in a situation where for almost 5 years, the Defendant, who would have been armed with the knowledge of the existence of the franchise agreement from the claim was served on it, has admitted to being the occupier of the premises at which the Claimant is alleging her injuries were sustained.

[13] The evidence given on behalf of the Claimant in response to the Defendant's application is that the Claimant sued the Defendant because the signage on the property informed her that the property was occupied by Juici Patties and as such she formed the opinion that Juici Patties was the properly named defendant. She

would not have known of a franchise agreement unless the defendant had so indicated when the acknowledgment of service and defence were served on her.

[14] The Defendant appears to now wish to dictate to the Claimant the party who is to be named as defendant. In my opinion a defendant cannot tell a claimant who she is to sue. If the defendant feels that he was wrongly sued and wishes to name someone else, then he can say so in his defence and then join the party as a third party in Ancillary Proceedings. In that regard he would be seeking to be indemnified fully or in part by the Third Party he has named. The Claim Form is the Claimant's document. It is not to be manipulated by the Defendant. The Defendant's documents are the Defence, Defence and Counterclaim and the Ancillary Claim Form. He can use any of those documents to put his case before the court.

[15] The Defendant relies on several cases to support his application for the substition. I will refer to two of the cases - **Elita Flickenger** (**widow of the deceased Robert Flickenger) v David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club & Cottages Limited CL F013 of 1997** and **Smithkline Beecham Plc** and **anor v Horne-Roberts [2001] EWCA Civ 2006**. In both cases the applications to substitute a defendant were made by the claimant in circumstances where the limitation period had passed and in circumstances where the claimant had made a mistake as to the naming of the party but had correctly identified the party which was sought to be sued. In the **Elita Flickenger case** the intended party to be sued was the owner and occupier of the premises and in the **SmithKline Beecham case** the intended party to be sued was the manufacturer of the vaccine. In both cases the substitution was allowed although the defendant was misnamed because the party who the claimant intended to sue was properly identified. The cases can be distinguished from the case at hand. Here the application is being made by the defendant not the claimant. As already stated, a defendant cannot amend a claim to put in the party he thinks the claimant should sue. And for this reason, the Defendant's application for an order that Elite

Restaurants Limited be substituted in place of Juici Patties as the Defendant in the claim cannot succeed.

[16] In addition to the substitution of the party the Defendant also wishes to amend the body of its defence to refer to Elite and the franchise agreement which is alleged to have existed between Juici Beef and Elite. Part 20 of the CPR deals with amendments to statements of case. In particular Part 20.4(2) provides that

> *"Statements of case may only be amended after a case management conference with the permission of the court."*

The CPR do not indicate what considerations the Court must make in granting the permission. In making a determination as to whether a defence should be filed out of time, the court has in the past considered

(a) whether the delay amounts to an abuse of the process of the court;

(b) whether the delay will prevent the other party from getting a fair trial; and

(c) whether (in this situation) the defence has a real prospect of success (see in support of this position ***Allan Lyle v Vernon Lyle*** **Claim No 2004 HCV 02246 pg 4)**

[17] Ms Hibbert relies on the case of ***George Hutchinson v Everett O'Sullivan*** **[2017] JMSC Civ 91** wherein Justice V Harris, as she then was, held that amendments to statements of case under CPR 19.4 and 20.6 should be allowed

> *"where it is necessary to decide the real issues in controversy, where it will not create any prejudice to the other party (such as presenting a new case) and is fair in the circumstances)" (see paragraph 27(iv) of the judgment).*

In the case of **Gloria Moo Young and anor v Geoffrey Chong et al [SCCA No 117/99 unreported delivered 23 March 2000**, Harrison JA made it clear that amendments may be granted *"when it is necessary to decide the real issues in controversy,* ***however late****"* [my emphasis].

[18] I was drawn to paragraphs 12 -16 of the defendant's submissions and the dicta referred to therein. I agree that it is always best for the court to examine the real dispute between the parties so it can settle it fairly, especially when the trial date is not in jeopardy. I note in particular the dictum of Bowen LJ in Cropper v Smith (1884) 26 CH D 700 as referred to in the decision of Fraser J, as he then was, in the case of ***National Housing Trust v Y P Seaton & Associates Company Limited*** **Claim No 2009 HCV 05733** decided on March 31, 2011 wherein he said at paragraph 21 of his decision quoting from Bowen LJ:

> *"Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace… It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his party to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right…".*

Fraser J in the said case also quoted from Peter Gibson LJ in ***Cobbold v London Borough of Greenwich*** at paragraph 24 of his judgment. Gibson LJ had this to say:

> *"Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."*

[19] If the amended defence is what the Defendant wishes to put forward as the defence to the claim then it should in my view be allowed to do so. However, the court cannot allow an amendment to a defence in circumstances where it is not likely that the defendant will succeed. Part 10.5 of the CPR provides that the defendant has a duty to set out its case. The defence must set out all the facts on

which the defendant relies to dispute the claim (CPR 10.5(1)). CPR 10.5(6) provides that

> *"The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence."*

The word "must" is used and must is mandatory. The Defendant seems to be relying heavily on the alleged franchise agreement which exists between the Claimant and the Defendant. Unfortunately, on Ms Chin's evidence the franchise agreement cannot be located and while the usual content of a franchise agreement would make the franchisee liable as occupier, the Court cannot speculate that this is the case in this particular agreement. A franchise agreement could have special conditions contained therein which provides an exception to that which is generally the case. Without having sight of the franchise agreement, I am unable to make a determination as to whether the amended defence being put forward would have a real prospect of succeeding. In addition, the Defendant would not be able to tender into evidence the franchise agreement if it is not available and without that document, how could the Defendant convince the Court of its existence and its terms?

[20] For these reasons the amendment being sought by the Defendant cannot be allowed. The Defendant, may of course renew its application if its circumstances change and the franchise agreement is located. If it finds itself in that position, I would suggest that the application and affidavit(s) in support be served on Elite. As it is also the Defendant's desire for Elite to be joined as a party in the claim, I would also suggest that the Defendant takes the necessary steps under Part 18 of the CPR as that would be the appropriate course of action.

Costs

[21] I agree with Ms Hibbert's submissions relating to the prejudice that has been caused to the Claimant who was deprived of her court date (November 2019) so that this application could be heard and who will now have to wait an additional 4

years for her matter to be heard. This delay and prejudice came about because the Defendant was not very careful in determining what defence it wished to put forward. The Defendant in 2015 filed an Acknowledgment of Service and Defence admitting that it was the occupier of the premises. It was its duty to initially state its true position – a position which it should have known from the day it came to the knowledge that a claim had been initiated against it. The cause of action is alleged to have arisen on or about June 17, 2011. The claim is one in negligence. In 2019 – more than 4 years after the initiating documents were served on it, the defendant wishes to change its defence naming another person as the occupier. It is at this point in time that the defendant is also providing the claimant with information that she would not otherwise have been privy to. What is problematic is that the defendant has provided this information after the limitation period has passed and where the claimant may have difficulty naming Elite as a defendant in the claim if it is proven that a franchise agreement between the Defendant and Elite does in fact exist and that franchise agreement would take away any liability from the Defendant.

[22] I have accepted the Claimant's evidence that she has incurred significant costs from having to defend the Defendant's various applications which have been brought before the Court. I believe that she should be able to recover some of these costs immediately without having to wait for a taxation hearing. It is for this reason that I have decided to assess costs summarily and not ask the parties to have the costs taxed before the Registrar. Additionally, I have taken into account the prejudice which the Claimant has suffered from losing her trial date and having to wait an additional 4 years for her matter to be heard and as such have made an award to cover the costs for that prejudice she has and will endure for her wait. A delayed trial means memories fade, witnesses become unavailable or cannot be traced and the administration of justice becomes uncertain (see the case of ***Heaven v Road and Rail Wagons, Limited***, [1965] 2 All ER 409).

[23] Mr Royale has argued that costs should be costs in the claim because the application is set for hearing at the Pre-Trial Review. This submission is incorrect.

The Court's records indicate that on September 19, 2019 Anderson J made an order that the Pre-Trial Review was to take place on January 15, 2024 at 10:30am for 30 minutes. Separate dates were scheduled for the hearing of the application. Notwithstanding, I however wish to address the issue of cost allowances at the hearing of a case management conference or pre-trial reviews, where the usual cost order is cost in the claim. Although the hearing of an application may be set for the case management conference or the pre-trial review, where the application is a significant one, which would allow the parties to have to do significant work in addressing the issues raised in the application, I believe costs should be costs in the application and not necessarily costs in the claim, which is the usual costs order made at a CMC or Pre-Trial Review. I am supported in this position by the case of **National Housing Trust v Y P Seaton & Associates Company Limited Claim No 2009 HCV 05733** which was also relied on by Mr Royale in his main submissions. In that case, Fraser J was confronted with a similar issue, i.e., whether costs in the application should be awarded when the application to amend the statement of case was made at a pre-trial review when the usual cost award is "costs in the claim". In that case, it was the claimant who had applied to amend its statement of case. Its application was successful and the defendant asked for costs in the application. Justice Fraser, placing reliance on the case of **Robert Cartrade and ors v Pan Caribbean Financial Services Limited and ors 2006 HCV 02958 (October 15, 2008)** in which costs were awarded against the claimants even though the application to amend was made at the first case management conference, ordered costs in the application in the defendant's favour on the basis that the defendant would have had to prepare for the application and would also suffer prejudice for the amendment being allowed. He held that the costs awarded in the application were to mitigate the prejudice the amendments may visit on the other party. In the case before me, the defendant is not being allowed to make the amendments sought but the application was a hotly contested one, which would require some degree of preparation by the Claimant's attorneys-at-law, and so the Claimant should be able to recover costs in these circumstances.

Conclusion

[24] I therefore order as follows:

a. The Defendant is not permitted to file and serve an Amended Defence in the claim.

b. The Defendant is not permitted to substitute Elite Restaurants Limited in its place in the claim herein.

c. Costs of the application in the amount of $295,000.00 are to be paid by the Defendant to the Claimant. Costs are to be paid to the Claimant on or before March 26, 2021.

d. The Defendant's application for leave to appeal is granted.

e. The Claimant's attorneys-at-law are to file and serve the Formal Order.