



[2018] JMSC Civ 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV01605

BETWEEN	CYRUS REID	CLAIMANT
AND	JP TROPICAL FOODS LIMITED	DEFENDANT

IN CHAMBERS

Ms. Gabrielle Warren instructed by Nunes Scholefield DeLeon & Co. for the Defendant/Applicant

Mr. Christopher Antoine instructed by K. Churchill Neita & Co. for the Claimant/Respondent

Heard: March 7 and 13, 2018

Civil Procedure – Striking out statement of case – Whether claim is statute barred - Rule 26.3 (1) of the Civil Procedure Rules; Limitation of Actions Act – Rule 20.6 of the Civil Procedure Rules

A. NEMBHARD, J (AG.)

[1] The instant matter involves a claim in negligence and/or breach of the statutory duty under the Occupier's Liability Act resulting in injury to the Claimant.

[2] It is the Claimant's/Respondent's contention that the Defendant/Applicant was at all material times the operators of the St. Mary Banana Estate. It is his further contention that at all material times he was employed to the Defendant/Applicant

as a field worker on the St. Mary Banana Estate and as such would be a lawful visitor to the said estate within the meaning of the Occupier's Liability Act.

- [3] On or around the 29th day of March 2009 the Claimant/Respondent further contends that, while in the course of his employment, he was instructed to remove crates from an upper floor which is usually accessed by a ladder.
- [4] Acting on those instructions, the Claimant/Respondent indicates that he placed a ladder against a wall that leads to the said upper floor and began to climb same.
- [5] It is whilst attempting to open a door on the said upper floor that the Claimant/Respondent alleges further that the ladder "**suddenly and without warning**" slipped and that he fell and sustained injuries.
- [6] At this juncture the Court is of the view that a chronology of the events that have brought us to this point is instructive.

CHRONOLOGY OF EVENTS

- March 13, 2015** The Claimant files suit against Jamaica Producers Group Limited.
- April 24, 2015** Jamaica Producers Group Limited files a Defence denying liability. Jamaica Producers Group Limited indicates the following:-
- ❖ That the Claimant was never employed to it;
 - ❖ That it never entered into a contract of service or a contract for service with the Claimant;
 - ❖ That at all material times the Claimant was employed to Agri Services Limited and/or JP Tropical Foods Limited.
- May 13, 2015** By way of an Amended Claim Form and Amended Particulars of Claim the Claimant amends his Claim to name the Defendant as Jamaica Producers Tropical Foods Limited.
- October 1, 2015** By way of a Further Amended Claim Form and Further Amended Particulars of Claim the Claimant

further amends his Claim to name the Defendant as JP Tropical Foods Limited.

November 10, 2015 The Defendant, **JP Tropical Foods Limited**, files an Amended Defence denying liability on the basis that the action is statute barred, the date of the alleged incident being **March 29, 2009** and the relevant limitation period expiring on **March 28, 2015**.

THE APPLICANT'S/DEFENDANT'S POSITION

[7] By way of a Notice of Application for Court Orders to Strike out Statement of Case, filed on the 20th day of June 2017, the Applicant/Defendant seeks the following three (3) Orders of the Court:-

1. That the Claimant's/Respondent's Statement of Case filed herein against the Defendant/Applicant be struck out as disclosing no reasonable ground for bringing the Claim;
2. That the costs of this Application be awarded to the Defendant/Applicant to be taxed if not agreed;
3. Such further and/or other relief as this Honourable Court deems just.

[8] The Applicant/Defendant seeks to ground its application on Rule 26.3 (1) (b) and (c) of the **Civil Procedure Rules, 2002**, (hereinafter referred to as "**the CPR**") and contends that the Claimant's/Respondent's Claim is an abuse of the process of the Court and/or that it discloses no reasonable grounds for bringing the Claim.

[9] The Applicant/Defendant further contends that the Claimant's/Respondent's Statement of Case discloses that the proceedings were commenced against it outside of the period provided by the Limitation of Actions Act for the commencement of proceedings for the recovery of damages arising from an alleged breach of duty or negligence.

- [10] Thirdly, the Applicant/Defendant contends that the Claimant's/Respondent's Claim is unsustainable in Law as it does not constitute a valid claim that is capable of being brought and maintained.
- [11] It was submitted on behalf of the Applicant/Defendant, as the Court understood the submissions, that, on April 24, 2015, Jamaica Producers Group Limited filed a Defence denying liability on the basis that the Claimant/Respondent was never employed to it and that it has never entered into a contract of service or a contract for service with the Claimant/Respondent.
- [12] In that Defence, filed on April 24, 2015, Jamaica Producers Group Limited also stated that "***at all material times the Claimant was employed to Agri Services Limited and/or JP Tropical Foods Limited, limited liability companies duly incorporated under the Laws of Jamaica.***" [Emphasis added]
- [13] It was further indicated that Jamaica Producers Tropical Foods Limited is not a legal entity and/or a company registered under the Laws of Jamaica and that Jamaica Producers Group Limited and JP Tropical Foods Limited are separate legal entities which operate different businesses.
- [14] It wasn't until October 1, 2015 that the pleadings were further amended to name the Defendant/Applicant as JP Tropical Foods Limited.
- [15] The Court understands the Applicant's/Defendant's submissions to be that the Claim filed against JP Tropical Foods Limited is statute barred by virtue of the Limitations of Actions Act, the six (6) year period from the date that the alleged cause of action arose having expired on the 28th day of March 2015.
- [16] It was further submitted on behalf of the Applicant/Defendant that the Claim is now statute barred and seeks to deprive it of the "***vested right of the limitation period derived from the statute.***"
- [17] The Court was referred to the authority of ***Construction Developers Association Limited v Urban Development Corporation*** Claim Nos. 2008

HCV 02213 and 2008 HCV 02214, judgment delivered on March 23, 2010 and that of ***Caribbean Development Consultants v Lloyd Gibson*** Suit No. CL. 323 of 1996, judgment delivered on May 25, 2004.

THE CLAIMANT'S/RESPONDENT'S POSITION

- [18] The Respondent/Claimant submitted, in response to the Application to Strike out the Statement of Case, that at the time of the first amendment "JP Tropical Foods Limited" was mistakenly thought to be an abbreviation and as such the Defendant was named as Jamaica Producers Tropical Foods Limited.
- [19] The Respondent/Claimant prayed in aid Rule 19.4 (2) of the ***CPR*** as authority for the Court to allow an addition or substitution of a party, if, at the time when the suit was initially commenced it was within the relevant limitation period and where the addition or substitution is necessary.
- [20] It was further submitted that Rule 20.6 of the ***CPR*** allows for amendments to a party's Statement of Case, subsequent to the expiration of a relevant limitation period, to correct a mistake in the name of a party.
- [21] The Court was referred to the authority of ***Elita Flickinger (Widow of the deceased Robert Flickinger) and David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club & Cottages Limited*** Suit No. C.L. F 013 of 1997.

THE ISSUES

- [22] The Court has identified the issues to be determined in the instant matter as follows:-
- i. Should the Claimant's/Respondent's Statement of Case be struck out on the basis that the Claim is now statute barred and seeks to deprive the Applicant/Defendant of the ***"vested right of the limitation period derived from the statute"***?

- ii. Should permission be granted retroactively to the Respondent/Claimant to amend his pleadings to name **JP Tropical Foods Limited** as the Defendant?
- iii. Should the Court grant such permission for the amendment at this stage of the proceedings, in circumstances where the Applicant/Defendant has made fulsome submissions that the Claimant's/Respondent's Statement of Case be struck out?

THE LAW

[23] Rule 26.3 of the **CPR** reads as follows:-

1. *"In addition to any other powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court –*
 - (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
 - (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim".*

[24] Rule 19.4 of the **CPR** reads as follows:-

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 of a party 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 or defendant.”

[25] Rule 20.6 of the **CPR** refers to amendments to Statements of Case after the end of a relevant limitation period and reads as follows:-

20.6(1) “This rule applies to an amendment to correct a mistake as to the name of a party but only where the mistake was –

(a) genuine; and

(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question.”

[26] Part 19 of the **CPR** deals with the addition and substitution of parties. Rule 19.1 declares that this Part deals with the change of parties after proceedings have been commenced.

[27] Rule 19.2 and Rule 19.3 deal with the change of parties before the limitation period has expired. Rule 19.4 deals with a change of parties after the end of a relevant limitation period.

[28] Rule 19.4, (2) and (3), states the criteria that must be fulfilled before there can be a change of parties. Rule 19.4 (2) requires that the action must have been commenced before the expiration of the relevant limitation period and that the change is necessary. Rule 19.4 (3) establishes the circumstances that meet the criterion of “**necessary**”.

[29] The three (3) sub-paragraphs are to be read disjunctively.

[30] Rule 20.6 appears in the Part of the CPR that deals with Amendments to Statement of Case and specifically with changes of name (s) after the expiration of a relevant limitation period.

- [31] Rule 20.6 gives the Court a discretion as to whether an amendment after the expiration of a relevant limitation period should be allowed.

ANALYSIS

Should the Claimant's/Respondent's Statement of Case be struck out on the basis that the Claim is now statute barred and seeks to deprive the Applicant/Defendant of the "vested right of the limitation period derived from the statute"?

- [32] In the instant matter, without the prior permission of the Court and after the expiration of a relevant limitation period, the Respondent/Claimant purported to have further amended the pleadings to name the Applicant/Defendant as the tortfeasor.
- [33] It is this action that forms the subject matter of the complaint that is made by the Applicant/Defendant. It is the Applicant's/Defendant's contention that this purported amendment seeks to bring a Claim against it after the expiration of the relevant limitation period. As such, it is submitted, the Claim is statute barred and seeks to deprive the Applicant/Defendant of the vested right of the limitation period derived from the statute.
- [34] Learned Counsel for the Respondent/Claimant has conceded that the relevant limitation period in the instant matter expired on the 28th day of March 2015, the incident giving rise to the cause of action having allegedly taken place on the 29th day of March 2009. He has also conceded that the further amendment to the pleadings that name the Applicant/Defendant as the tortfeasor in the instant matter was made subsequent to the expiration of the relevant limitation period and without the prior permission of the Court, no Application for such an amendment having been made.
- [35] It is the considered view of this Court that Part 20 of the **CPR** establishes a regime whereby amendments can be made to a party's Statement of Case with and without the prior permission of the Court in certain sets of circumstances.

- [36] An amendment to a party's Statement of Case after the expiration of a relevant limitation period can only be made with the Court's permission. The Rules give the Court a discretion as to whether or not to allow such an amendment as is signified by the use of the word "**may**" in Rule 20.6 of the **CPR**.
- [37] The Court finds that, as it currently stands, there is no further amendment to the Respondent's/Claimant's pleadings naming the Applicant/Defendant as tortfeasor.
- [38] What was purported to have been done on October 1, 2015 was done after the expiration of the relevant limitation period and without the permission of the Court.

Should permission be granted retroactively to the Respondent/Claimant to amend his pleadings to name JP Tropical Foods Limited as the Defendant?

- [39] The issue for the determination of the Court therefore then, is, whether permission can and should properly be granted retroactively to the Respondent/Claimant for his pleadings to be amended to name JP Tropical Foods Limited as Defendant.
- [40] Bryan Sykes J , as he then was, in the authority of ***Elita Flickinger (Widow of the deceased Robert Flickinger) and David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club & Cottages Limited (supra)*** recognized that:-

"often times, whether because of carelessness or otherwise, errors are made when the Claimant is seeking to identify and name the correct defendant The risk of error is perhaps greater when one is suing a company. Sometimes the wrong tortfeasor is sued. At other times, the correct tortfeasor is sued but is given the wrong name. The wrong name may be a simple case of misspelling or it may be much more serious, such as giving the defendant the name of an existing person. When a correctly identified defendant is given, erroneously, the name of an existing person, the situation closely resembles one in which the wrong Defendant is identified. Outwardly, both are the same. It will often be a close call to decide

which it is. This is why a clear, comprehensive account setting out how the error occurred is important.”

[41] Sykes J indicated further that *“the Courts have sought to resolve the issue by the most intelligible and sensible way. The Courts ask ‘Who did the Claimant intend to sue?’ In answering this question the Courts look at all the circumstances of the case.”*

[42] The analysis of Donaldson LJ in ***Evans Construction Co. Ltd. Vs Charrington & Co. Ltd.***, [1983] QB 810, at page 821 of the judgment, is instructive.

[43] Donaldson LJ is quoted as saying:-

*“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...Which category is involved in any particular case depends upon the **intentions of the person making the mistake and they have to be determined, on the evidence, in the light of all the surrounding circumstances.**”*

[Emphasis added]

[44] The decision of ***Evans Construction Co. Ltd. Vs Charrington & Co. Ltd.***, (*supra*) is a decision concerning the Civil Procedure Rules of the United Kingdom, rule 19.5, which reads in pari passu with rule 19.4 of the CPR.

[45] Applying the learning from Bryan Sykes J in ***Elita Flickinger (Widow of the deceased Robert Flickinger) and David Preble (t/a Xtabi Resort Club & Cottages) and Xtabi Resort Club & Cottages Limited (supra)***, as to the approach to be taken in considering whether an application for an amendment to a party’s Statement of Case should be granted, subsequent to the expiration of a relevant limitation period, this Court is of the view that in all the circumstances of this case it would not be fair to grant the application, at this stage of the proceedings, for the amendment of the pleadings to name JP Tropical Foods Limited as the Defendant.

- [46] The Court finds that Jamaica Producers Group Limited, though under no obligation so to do, was very deliberate in alerting the Respondent/Claimant to the correct name of his employer for the purpose of his Claim. This was done from as far back as April 24, 2015.
- [47] The Court also finds that prior to being so alerted, the Respondent/Claimant would have had knowledge of the name of his employer from the American Home Assurance Company Personal Accident Claimant's Statement of Disability form, a document that was signed by him.
- [48] In all of those circumstances the error in the name of the Defendant was unfortunate.

Should the Court grant permission for the amendment at this stage of the proceedings, in circumstances where the Applicant/Defendant has made fulsome submissions that the Claimant's/Respondent's Statement of Case be struck out?

- [49] In light of the foregoing and in all the circumstances of this case the Court finds that to grant the Respondent's/Claimant's application for the amendment, in order to remedy that which forms the gravamen of the complaint made by the Applicant/Defendant, would be unfair and would deny the Applicant/Defendant of a valid defence – that of the expiration of a relevant limitation period.

THE ISSUE OF COSTS

- [50] The Applicant/Defendant also seeks an Order as to costs.
- [51] If the Court decides to make an order about the costs of any proceedings the general rule is that it must order the unsuccessful party to pay the costs of the successful party. The authority for that is Rule 64.6 (1) of the **CPR**.
- [52] In deciding who should be liable to pay costs the Court must have regard to all the circumstances. Rule 64.6 (3) of the **CPR**.

- [53] In particular, the Court must have regard to the conduct of the parties both before and during the proceedings; whether it was reasonable for a party to raise a particular issue; and/or the manner in which a party has pursued that party's case or a particular issue. Rule 64.6 (4) (a), 64.6 (4) (d) (ii), 64.6 (4) (e) (i) and (iii) of the **CPR**.
- [54] The Court finds that the application for costs is reasonable in all the circumstances of the instant case.
- [55] The Court has regard to the conduct of the Applicant/Defendant during the proceedings in seeking to alert the Respondent/Claimant to the correct name of his employer, some two (2) years ago. The Court also has regard to the conduct of the Respondent/Claimant in omitting to effect the amendment to the pleadings, to reflect the name of the correct tortfeasor, prior to the expiration of the relevant limitation period and in failing to seek the permission of the Court, subsequent to the expiration of the relevant limitation period, to have that amendment made.

CONCLUSION

- [56] In light of the foregoing the Applicant's/Defendant's application to strike out the Statement of Case is granted.
- [57] The Respondent's/Claimant's application for permission to amend the pleadings is refused.

ORDER

1. The Respondent's/Claimant's Statement of Case is struck out;
2. Costs to the Applicant/Defendant to be taxed if not sooner agreed;
3. The Respondent's/Claimant's application for permission to amend his pleadings is refused;
4. The Applicant's/Defendant's Attorneys-at-Law are to prepare, file and serve the Orders herein.