



[2023] JMSC Civ 91.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV04108

BETWEEN	JHENNIEVE HYLTON	CLAIMANT
		1ST DEFENDANT
AND	THOMPSON'S HAULAGE CONTRACTORS &	
	SERVICES LIMITED	
AND	FLOW JAMAICA LIMITED	2ND DEFENDANT
AND	CABLE & WIRELESS JAMAICA LIMITED	3RD DEFENDANT
AND	COLUMBUS COMMUNICATIONS JAMAICA LIMITED (T/A FLOW JAMAICA)	4TH DEFENDANT

IN CHAMBERS

Mr. Ian Davis, Attorney-at-Law instructed by I P Davis & Co, Attorneys-at-Law for the Claimant

Mr. Kevin Williams and Ms. Regina Wong, Attorneys-at-Law instructed by Grant, Stewart, Phillips & Co., Attorneys-at-Law on behalf of the 2nd, 3rd and 4th Defendants.

HEARD: May 4 and 26, 2023

Civil Procedure- Civil Procedure Rules 19- Addition and Substitution of Parties- Application to amend- Whether the claim is a nullity.

P. MASON J (AG.)

BACKGROUND TO THE APPLICATION

[1] On the 26th of October 2020, the Claimant filed a Claim Form and Particulars of Claim against Thompson's Haulage Contractors & Services Limited, the 1st Defendant and Flow Jamaica Limited, the 2nd Defendant seeking damages for Negligence and/or breach of statutory duty arising from an incident which took place on the 25th of July 2018 in

which the Claimant slipped and fell on a broken staircase while employed to the 2nd Defendant at 47 Half Way Tree Road, Kingston in the parish of St. Andrew.

[2] The 1st Defendant filed its Defence on January 15, 2021. Default Judgment was entered against the 2nd Defendant on January 29, 2021, for failure to file an acknowledgment of Service and Defence.

[3] An Acknowledgement of Service was thereafter filed on behalf of the 2nd Defendant by its Attorneys on February 16, 2021, and served on the Claimant on the same date. In the said Acknowledgment of Service, it was indicated on behalf of the 2nd Defendant that the Claim Form and Particulars of Claim were received without the relevant supporting documents and that Flow Jamaica Limited was not the 2nd Defendant's proper name. The 2nd Defendant further indicated that its proper name was Cable & Wireless Jamaica Limited. It was also indicated that the 2nd Defendant intended to defend the claim as to both damages and liability. It also further indicated that its obligation to defend the claim only falls due when the proper Defendant is named.

[4] On the 18th of February 2021, the 2nd Defendant filed a Notice of Application for Court Orders to set aside the Default Judgment, to strike out the Claim and for summary judgment to be entered. The orders being sought are as follows:

- 1) *That any Judgment in Default of Acknowledgment of Service of Claim Form and/or Defence filed by the Claimant against the 2nd Defendant be set aside.*
- 2) *That the time limited for filing an Acknowledgement of Service of Claim Form be extended to the 16th February 2021 and that the Acknowledgement of Claim Form filed on the 16th February 2021 do stand.*
- 3) *That the time limited for filing the 2nd Defendant's Defence be extended to fourteen days of the date of the Order herein and the time for service of that Defence be extended to seven (7) days of the date of the filing of the Defendant's Defence.*
- 4) *That the costs occasioned by the Application to set aside Default Judgment be that of the 2nd Defendant to be taxed if not agreed.*
- 5) *That in the alternative to paragraphs (sic) 1 of this Application, there be summary Judgment for the 2nd Defendant on the Claim or that the Claim be struck out.*
- 6) *That the costs of the Summary Judgment Application be that of the 2nd Defendant along with all other costs occasioned by this action.*
- 7) *Such further and other relief and orders as this Honourable Court shall deem fit in the circumstances of this case.*

[5] The grounds on which the application is being made are as follows:

- (a) Pursuant to PART 13.2 of the CPR, in that, the 2nd Defendant, which is not a legal entity was never served with the Claim Form (and accompanying documents) and the Particulars of Claim herein.
- (b) Pursuant to PART 13.3 of the CPR, in that, even though the Defendant has delayed in making the Application to set aside the Default Judgment, if any, the Defendant nonetheless has a Defence will (sic) a real prospect of succeeding;
- (c) Pursuant to PART 15.2(a) of the CPR in that the Claimant has no real prospect of succeeding on the Claim as the 2nd Defendant is not a legal entity;
- (d) In the court's exercise of its Case Management Powers and pursuant to PART 26.3(1)(c) of the CPR in that the Claimant's Statement of Case discloses no reasonable grounds for bring(sic) the Claim in that the 2nd Defendant is not a legal entity;

[6] On June 14th 2022, the Claimant filed an Amended Claim Form and Particulars of Claim naming Cable & Wireless Jamaica Limited as the 3rd Defendant which was thereafter served on Cable & Wireless Jamaica Limited on June 17, 2022.

[7] On February 24, 2023, the Claimant filed an Affidavit in response to the 2nd Defendant's Amended Notice of Application for Court Orders sworn to by Sonji Gordon. This Affidavit contained a 4th Defendant, Columbus Communications Jamaica Limited (t/a Flow Jamaica). No further amended Claim Form or Particulars of Claim were filed indicating the addition of the 4th Defendant.

SUBMISSIONS

[8] Counsel Mr. Kevin Williams, on behalf of the 2nd Defendant, submitted that the claim form is a nullity. He further stated that the naming of a non-existent entity either as Claimant or Defendant means that the Claim Form is null and void and of no effect from the date that it was issued.

[9] Mr. Williams referred to the Affidavit of Sonji V. Gordon in response to the amended Notice of Application for Court Orders filed on February 24, 2023 where she explained that the mistake in naming Flow Jamaica Limited as the original 2nd Defendant was a genuine mistake which ought to be excused by the court due to the fact that it arose in circumstances where junior counsel made a mistake in not undertaking the proper research in ascertaining the legal name of the Defendant. Mr. Williams submitted that this does not assist the Claimant as the claim was a nullity as filed and cannot be fixed

by excusing the incompetence of counsel or addressing the prejudice to the Claimant. [10] Mr. Williams submitted several cases to support his submissions including **Caribbean Development Consultants v Lloyd Gibson** (unreported) SUIT C.L. 196/C. 323, judgment delivered on 25th May 2004 and **International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corporation of India & Others** (1996) 1 ALL ER 1017.

[11] Counsel for the Claimant, Mr. Ian Davis, has submitted that the amendments ought to be allowed due to the fact that the application is being made at the case management conference and the relevant limitation period has not yet expired. Mr. Davis submitted that the Claimant discovered that the name of the 2nd Defendant was incorrect and ought to be changed to Columbus Communications Jamaica Limited (t/a Flow Jamaica). This, he says, was discovered before case management conference and before the relevant limitation period had expired.

[12] Mr. Davis relied on the case of **Juici Beef Limited (t/a Juici Patties) v Yenneke Kidd** [2021] JMCA Civ 29 where the court allowed the addition of a Defendant “Elite Restaurants Limited” after the expiration of the limitation period and after the Case Management Conference had passed. The Court at paragraph 74 stated:

[64] The particulars of claim make it clear that Ms Kidd intended to bring a claim against the occupier of the premises. Counsel for Juici is correct in that submission. However, she could not have been expected to know of Elite or the arrangement between Juici and Elite. As such, her institution of the claim against Juici is quite logical and was to be expected since it was Juici’s signage and branding that she observed at the premises. It would have been Juici’s responsibility to have disclosed the information on which it is now seeking to rely.

[13] In the Affidavit of Sonji V. Gordon in response to the amended Notice of Application for Court Orders filed on February 24, 2023, Ms. Gordon who is sworn as one of the Claimant’s Attorneys-at-Law stated at paragraphs 7, 8 and 9, that:

7. At all material times the Claimant was under the honest belief that the legal name of the entity which she wished to sue operated under the name of Flow Jamaica Limited. This is because the business which operates at 47 Half Way Tree Road, Kingston 5 (the property) where the accident occurred advertises itself by billboard and other paraphernalia as being that of "Flow Jamaica". This is compounded by the Claimant's identification card and pay slips also bearing the name "Flow Jamaica". At no time was she aware that the legal name of the

company was Columbus Communications Jamaica Limited (t/a Flow Jamaica).

8. *At the commencement of the claim, and before we were approached, the Claimant was assisted by junior counsel who in error failed to carry out a company search so as to clarify the Claimant's assertions as to whether the company which she wished to sue was Flow Jamaica Limited, Cable & Wireless Jamaica Limited or Columbus Communications Jamaica Limited.*

9. *The Claimant would suffer grave prejudice if she was punished for counsel's mistake which was no fault of her own.*

ISSUE

[14] At the hearing on May 4, 2023, the Claimant had conceded that the Default Judgment should be set aside. Therefore, I will only proceed to deal with the issue of whether the court ought to allow the substitution of Flow Jamaica Limited for Columbus Communications Jamaica Limited (t/a Flow Jamaica).

LAW

[15] Civil Procedure Rules, 2002 ("CPR") r. 19.2 (1) states that a claimant may add a new defendant to proceedings without permission at any time before the case management conference. CPR r. 19.2 (2) states that the claimant does so by filing at the registry an amended claim form and particulars of claim and Parts 5 and 7 (service of claim form), Part 9 (acknowledgment of service and notice of intention to defend), Part 10 (defence) and Part 12 (default judgments) which apply to the amended claim form as they do to a claim form. CPR r. 19.2 (4) states that the court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

[16] CPR r. 19.2 (5) states that 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.

[17] In the case of **Juici Beef Limited (Trading As Juici Patties) v Yenneke Kidd** (Supra) which was an application to amend the statement of case after a case management conference, Straw JA stated at paragraph 60 of the said judgment, that:

[60] The court is given wide powers under part 19 of the CPR which pertains to the addition, substitution and removal of parties. Many of the powers can even be exercised without an application; this is undoubtedly, to allow the court to ensure the proper parties are before the court for resolving the matters in dispute, thereby furthering the overriding objective.

ANALYSIS

[18] Before I proceed, I think it is necessary to mention that attorneys have a duty to conduct the appropriate research to ascertain the proper names of the parties involved in a claim before any documents are filed in the court.

[19] In this particular case, counsel failed to take the necessary steps to ensure that the proper parties were named in the claim. As such, the court must proceed to ascertain whether the claim should be permitted to proceed and whether it ought to allow the Claimant to substitute “Flow Jamaica Limited” with “Columbus Communications Jamaica Limited (t/a Flow Jamaica)”.

[20] As outlined above, CPR r. 19. 2 (5) states that 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.

[21] CPR 19.3(5) states that the court may add, remove, or substitute a party at or after the case management conference. The present application is being made at case management conference.

[22] Counsel for the 2nd Defendant has submitted that the claim as filed is a nullity as the party against whom it was filed is non-existent. Counsel cited **Caribbean Development Consultants v Lloyd Gibson** (supra) which stated:

" The point can be reduced to this: only legal entities can sue or be sued. The claim is not a legal entity. Therefore, the Claimant cannot sue. The legal consequence of this.. is that the matter should be struck out unless it can be saved by rule 19.4 of the Civil Procedure Rule (CPR). He submits that that rule cannot save this matter from oblivion. A bit of context is necessary.

A sad tale

The Affidavits filed by the attorneys for the claimant reveal some degree of carelessness. None of them seemed to have done the elementary research to ensure that Caribbean Development Consultants (CDC) was a legal entity.”

- [23] That particular case dealt with a preliminary point in which Sykes J (Ag.) (as he then was) was tasked with determining whether to allow the substitution of parties under CPR r. 19.4, after the expiration of the limitation period. Caribbean Development Consultants, the Claimant, was not a legal entity. Sykes J (Ag.) (as he then was) in dismissing the claim, held that the original proceedings were a nullity since one party to the suit was not a legal entity.
- [24] This case must be distinguished from the case at bar on the basis that that was an application made after the limitation period had expired and it was the Claimants who were seeking the substitution. This was also not a matter of a mistake in the naming of the entity, CDC. The fact was that CDC brought a claim with the mistaken belief that they were a legal entity which could sue.
- [25] Additionally, in the case of **Caribbean Pirates Theme Park Limited v Irish Rover Limited [2015] JMSC Civ 158**, where the Defendant made an application to strike out the statement of case on the basis that the company *Caribbean Pirates Theme Park Limited* did not exist. It is important to note that the limitation period had not yet passed. The Claimant relied on the case of ***Caribbean Development Consultants v Lloyd Gibson (Supra)***. Batts J in ***Caribbean Pirates Theme Park Limited v Irish Rover Limited (Supra)*** declined to follow that decision. At paragraph 11 and 12, he stated:

“[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?”

- [26] The case of ***International Bulk Shipping and Services Ltd v Minerals and Metals***

Trading Corporation of India & Others (supra) as submitted by Mr. Williams, must also be distinguished on the basis that that case related to a company that was dissolved prior to the commencement of the actions. This is an entirely different context from the case at hand. That company itself was non-existent. It was not a situation where there was a mistake in stating the name as in the case at bar.

[27] Batts J further stated at paragraph [19] of **Caribbean Pirates Theme Park Limited v Irish Rover Limited (Supra)** that:

“[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.”

[28] In **Caribbean Pirates Theme Park Limited v Irish Rover Limited (Supra)**, the Defendant argued 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”*

[29] Batts J in dismissing the case, stated at paragraph 7 and 8 of the said 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 [rule 20.6.(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.”

My emphasis

[30] Further, at paragraph 21, Batts J referred to the case of **Gregson v Channel Four Television Corporation [2000] ALL ER (D) 956**, where the Defendant (a dormant company) was mistakenly named in the claim. On an application made by the Claimant, after the limitation period to amend the name, the Claimant was allowed to do so on the basis that the mistake was not such as to cause reasonable doubt as to the identity of the party in question.

[31] In the case at bar, Columbus Communications Jamaica Limited (t/a Flow Jamaica) is listed as “Flow Jamaica” in most of its advertisements, including billboards and other paraphernalia. Therefore, it is reasonable that a person might mistakenly believe that

the name of the company is Flow Jamaica. However, as indicated earlier, counsel had a responsibility to ensure that the proper parties were named before the documents were filed.

[32] One of the reasons presented in the case at bar for the error in naming the 2nd Defendant was due to the fact that junior counsel failed to conduct the proper search. On an assessment of all documents filed in the matter, Mr. Ian Davis is listed as the Attorney with conduct of the matter. This explanation I do not accept. Senior Counsel, out of an abundance of caution, ought to have reviewed the work of junior counsel before the pleadings were filed.

[33] Counsel for the 2nd and 3rd defendants has proceeded on the basis that the 2nd Defendant does not exist and, therefore, cannot be sued. However, counsel has, albeit out of time, acknowledged service of the claim as the 2nd Defendant and provided the correction to the name as Cable & Wireless Jamaica Limited while also indicating its intention to defend the claim. The Defendants further filed an amended Notice of Application including the 2nd and 3rd Defendants thereby accepting that they are parties to the claim.

[34] In ***Caribbean Pirates Theme Park Limited v Irish Rover Limited (Supra)***, Batts J at paragraph [15] found:

“[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.”

[35] I therefore make a similar finding as the case at bar is very similar. The Defendants have suffered no prejudice by the Claimant’s error since the Defendants acknowledged service of the claim and outlined their intention to defend it. Additionally, the limitation period has not yet passed. Based on the actions of the 2nd Defendant, I am of the view that it would be prejudicial to the Claimant to declare the proceedings a nullity.

[36] In that context, I contend that the court has the jurisdiction to deal with this matter and to correct the procedural error. Subject to CPR r. 26.9, the court has the general powers to rectify matters where there has been a procedural error. CPR r. 26.9 (3) states:

Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

[37] Additionally, on perusal of the documents filed by counsel for the claimant, I found that Columbus Communications Jamaica Limited was only included as a 4th Defendant in the Affidavit of Sonji V. Gordon in response to the amended Notice of Application for Court Orders filed on February 24, 2023. This is procedurally incorrect. I am of the view that if Columbus Communications Jamaica Limited was a proper party, this would have been indicated by 2nd Defendant when Cable & Wireless Jamaica Limited was named as the proper party in the Acknowledgement of Service. CPR r. 19.2 (1) gives a claimant the authority to add a new defendant to proceedings without permission at any time before case management conference. Therefore, during or after case management conference, the Claimant ought to seek the permission of the court to do so.

[38] To achieve the overriding objective and for the court to do justice between the parties, I will permit the Claimant to substitute Flow Jamaica Limited with Cable & Wireless Jamaica Limited as the 2nd Defendant by virtue of the authority granted to this court under CPR r. 19.3 (1) (2) and (5). In addition, to borrow the phrase of Straw JA in the case of **Juici Beef Limited (Trading As Juici Patties) v Yenneke Kidd (Supra)**, “*The court is given wide powers under part 19 of the CPR.....this is undoubtedly, to allow the court to ensure the proper parties are before the court for resolving the matters in dispute, thereby furthering the overriding objective.*”

[39] As it relates to the conduct of counsel for the claimant, I find his conduct to be improper, careless, and reprehensible. Had the necessary research been conducted prior to the matter being brought before the court, this fiasco could have been completely avoided. Consequently, Counsel will be burdened with paying the cost in this application.

ORDERS

[40] I therefore make the following orders:

1. The Default Judgment entered in Binder no. 777 and Folio 128 in favour of the Claimant against the 2nd Defendant on January 29, 2021 is set aside.
2. The Claimant shall, on or before June 2nd 2023, file and serve a further amended Claim Form and Particulars of Claim to name "Cable & Wireless Jamaica Limited" as the 2nd Defendant to the Claim.
3. The 2nd Defendant is permitted to file an acknowledgement of service within 14 days of the date of this order.
4. The 2nd Defendant is to file and serve a Defence within 28 days of the date of service of the amended Claim Form and Particulars of Claim.
5. The parties are to attend mediation on or before September 29, 2023.
6. Case Management Conference is adjourned to November 28, 2023, at 12 noon for ½ hour.
7. Cost of this application to the 2nd Defendant, Cable & Wireless Jamaica Limited, to be borne by counsel for the Claimant.
8. The Claimant's Attorneys-at-Law shall prepare, file, and serve this Order.
9. Leave to appeal is granted.