



[2014] JMSC Civ. 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008 HCV 03090

BETWEEN	IVAN SMITH (Administrator of Estate Kathleen Smith)	CLAIMANT
AND	C.D.F. SCAFFOLDING & BUILDING EQUIPMENT LIMITED	1ST DEFENDANT
AND	OWEN CHAMBERS	2ND DEFENDANT
AND	ANDRE JOHNSON	3RD DEFENDANT

Ms Sandra C. Johnson instructed by Sandra C. Johnson & Co., for Claimant.

Ms Carol Davis for the Defendants.

Heard on April 2 and 2nd June 2014

Claimant's Notice of Application for Court Orders – Defendant's Notice of Application for Court Orders – Amendment to statement of case – Principles – Part 20 of Civil Procedure Rules – New "evidence" – Allegation of fraud

Coram: MORRISON, J.

The case at bar warrants that I refer to the terms of the pleadings.

[1] From the Claim form, which was filed on June 18, 2008, the Claimant, Ivan Smith, businessman of St. Catherine, the beneficial owner of the majority shares in the first Defendant company claims against the Defendants “declaratory judgments touching and concerning the second and third Defendants status as shareholders and directors of the first Defendant company and for damages for conversion and breaches as well as for a declaration concerning the Claimant’s equitable interest in shares of the first Defendant’s company and against the first Defendant for rent, for use and occupation of 2 Verbena Avenue, Kingston 11, by the first Defendant company”. Further, continues the Claim Form “That as a consequence of breaches and unlawful actions an *ultra-vires* conduct of the 2nd and 3rd Defendants, the Claimant has suffered loss and damage and have incurred expenses and unless the 2nd and 3rd Defendants are restrained the financial resources of the company are at risk of being depleted and/or completely flitted away”.

[2] Accordingly, the Claimant also sought an injunction restraining the 2nd and 3rd Defendants from continuing their unlawful and *ultra vires* act and breaches of the Articles of Association of the 1st Defendant’s company, a registered limited liability with its registered office in St. Catherine.

[3] From the Particulars of Claim, the Claimant pleads that he was granted Letters of Administration by the Supreme Court of Judicature of Jamaica in the estate of Kathleen Elfreda Chambers Smith former Chairman and principal officer and majority share holder of the 1st Defendant’s company.

[4] The real offending of the 2nd and 3rd Defendants seem to be this: “That the 2nd and 3rd Defendants have by *ultra vires* and unlawfully means caused their names to be entered into the company’s accounts and have unlawfully removed over \$10 Million Dollars from the said company’s bank accounts which at the time of death of the said Kathleen Elfreda Smith on December 8, 2007 had a total of approximately \$18.8 Million

Dollars but by March 31, 2008 the said accounts had the approximate sum of \$8.9 million dollars and two letters from RBTT Bank Jamaica Ltd., both dated April 4, 2008 are attached to the Particulars of Claim herein' (sic)".

[5] The above state of affairs, pleads paragraph 6, is that since the death of Kathleen Elfreda Chambers Smith, the "2nd and 3rd Defendants have walked into the 1st Defendant's company and have taken over the control and operations of same indicating that they were Directors and Shareholders and were entitled to run the said company. "Further, pleads paragraph 8, the 2nd and 3rd Defendants, unlawfully and *ultra vires* to the Articles of Association of the company, appointed themselves as Managing Director and Director, respectively. In addition, as per paragraph 9," the Defendants have refused to honour Agreement of Lease for use and occupation of 2 Verbena Avenue, Kingston 11, in the parish of St Andrew, entered into between Kathleen Elfreda Chambers Smith for the sum of \$40,000.00 payable each month and to which the Claimant is now equitably entitled".

[6] According to paragraph 9, the 2nd and 3rd Defendants breached the Articles of Association of the 1st Defendants in that one Franklyn Fullwood and Earl Douglas, both original Directors and subscribers and shareholders, purported to transfer to the said 2nd and 3rd Defendants their four shares which remain their property and as such "the 2nd and 3rd Defendants are not legal shareholders at all of the 1st Defendant company".

[7] As to paragraph 12 it suffices to say that it contains a raft of breaches on the part of the 2nd and 3rd Defendants, which for present purposes need not be set out.

[8] As noted above the critical paragraphs in the Particulars of Claim are 6,7,8,9,10 and 12.

[9] To these the Defendants have joined issue and have counter claimed for damages for breach of the Agreement for lease; a declaration that the shareholding of the 1st Defendant company is held in the proportion of 14 shares to Kathleen Chambers, 70,002 to the 2nd Defendant and 30,002 shares to the 3rd Defendant; a declaration that the 1st Defendant is entitled to a share in premises know as 2 Verbena

Avenue in proportion of \$15,097,050.00 to the value of the premises; damages of fiduciary duty.

[10] It is against the above sketched background that the Notices of Application for Court orders were filed.

CLAIMANT'S APPLICATION

[11] The Claimant's Notice of Application for Court Orders was filed on November 20, 2012. The Claimant seeks the following orders that:-

- 1) Permission be granted "to amend the claim form to include new evidence of the formation new company, CDF Scaffolding 2010 Limited (sic), by the 2nd Defendant, Owen Chambers on October 28, 2010 during the currency of this action in breach of his fiduciary duty and in conflict with his position as 'Director' of the 1st Defendant Company".
- 2) The Claimant be allowed to have the Bank of Nova Scotia (Jamaica) Limited (BNS), Spanish Town branch or any other bank in which the company, CDF Scaffolding 2010 Limited does business, make available directly to the Claimant or to the Registrar of the Honourable Court, all bank statements, encashed cheques and statement showing the signees on the said accounts (sic).
- 3) The BNS, Spanish Town branch or any other bank in which the company, CDF Scaffolding 2010 Limited does business, make available directly to the Claimant or the Registrar of this Honourable Court, all bank statements, pertaining to Account No. 80275-828051.
- 4) RBC Bank or any other bank in which the 1st Defendant Company, CDF Scaffolding Building & Equipment Limited does business, to make available to the Claimant or the Registrar of this Honourable Court, a statement as to the signees of the said account as per Order of the Hon. Justice Campbell made on September 16, 2010.

- 5) Such further and other consequential orders or relief as may be just.
- 6) Cost of this application to be in the Calm.

The grounds on which the applicant is seeking the orders are stated to be –

- a) By virtue of the Civil Procedure Rules, 2002 (Amended).
- b) In pursuance of the Overriding Objective (sic).

[12] In support of the Application by the Applicant/Claimant reliance was placed on the affidavit of Ivan Smith. It is dated November 20, 2012; supplemental affidavit of Ivan Smith dated May 9, 2013 with proposed Amended Claim form; affidavit of Ivan Smith in reply to the Affidavit of Owen Chambers dated June 20, 2013.

DEFENDANT'S APPLICATION

[13] The above Notice of Applications for Court Orders is dated December 7, 2012. The Defendants have asked for the following orders:

1. That paragraph 13 of the Order of Honourable Justice Campbell made on 16th September 2010 be varied to read: The Claimant's name is to be added as one of the signatories to the Current Account #0121310000291 and all other accounts held by the 1st Defendant Company, CDF Scaffolding & Building Equipment Limited.
2. That the Defendant (sic) be permitted to amend its Counterclaim to add a Claim to set aside for fraud the allotment of the shares in the 1st Defendant Company by which the deceased Kathleen Chambers wrongfully purported to have allotted to herself 186 additional shares.
3. Further or other relief .

The stated grounds of the Application are:

- a) The Claimant consented to himself and others being added as signatories to the account of the 1st Defendant.
- b) That Kathleen Chambers on or about 1999 allotted 186 shares to herself in circumstances when she knew that the said allotment was in breach of the Articles of Association of the Defendant company and wrongfully attempted to conceal the said allotment from the 2nd Defendants herein.

AFFIDAVIT EVIDENCE OF IVAN SMITH

[14] I shall here attempt a summary of this Applicant's Affidavit evidence. He has placed reliance on four (4) affidavits in support of his own Application and in opposition to the Defendants Notice of Application for Court Orders. The affidavits are dated November 20, 2012, November 28, 2012, May 9, 2013 and June 20, 2013.

[15] In essence this affiant states that he has recently found out that the second Defendant has formed a new company which is in conflict and/or in breach of the second defendant's duty as a Director the first defendant. Second, he depones that the second defendant has channelled most to the first defendant's cheques into the accounts of the new company thus necessitating the need to file a proposed amended claim form. The proposed amended Claim Form was attached absent any amended particulars of claim. Third, pursuant to an order made by Sinclair-Haynes, J on May 25, 2012, "The Sinclair-Haynes Order", the second and third defendants were to have made specific disclosure of all bank records and statements in relation to the new company on or before June 25, 2012. The defendants did not obey this order, *strictu sensu*, but instead forwarded a "history of the account of the new company and undated and unidentifiable statements" in lieu of the ordered documentation. Fourth, that the new company which is inauthentic is in contempt of proceedings and the order of Pusey, J made on July 15, 2008, 'The Pusey Order'.

[16] The said order reads:-

- 1
2. By consent, 2nd Defendant and 3rd Defendant are to appoint the Claimant as Director of the 1st Defendant company within 14 days of the date hereof
- 3 ...
4. Any increase in share capital and or allotment made after 8th December 2007 is stayed until the determination of this matter or further order of the Court.
5. ...
6. ...
7. ...
8. ...

[17] Fifth, this deponent denies having received any notice of a Directors meeting, contrary to the assertions of the first defendant; that he was never informed that he had been made a Director (as per the Pusey Order). However, he states, that he was invited to a Directors meeting for July 31, 2008 but was given less than 24 hours notice. At this meeting, he asserts, spurious allegations were made against him and another resulting in their being falsely prosecuted. After acquittal he made the decision “not to attend any further Directors meeting for fear of being falsely accused a second time”.

OWEN CHAMBERS

[18] Both in support of his Joint Application for Court Orders with the 3rd Defendant and in response to the matters raised by the Claimant in his affidavits, this deponent

provided three affidavits. They are dated December 10, 2012, July 22, 2013 and September 3, 2013.

[19] He depones that in keeping with orders made by Campbell, J on September 16, 2010, the Claimant's name was to be added as one of two signatories to the current account of the first defendant. In fulfilment of this obligation he asserts that a "notice [was] given of a Directors meeting to add the Claimant's name as a signatory to the Company's bank account" on October 15, 2010. He asserts that this meeting was in fact held and that the Claimant was present. At this meeting it was agreed to give instructions to the bank for the Claimant's name to be added as a signatory. However, he tendered the view as to the impracticability in so doing owing to the Claimant's irregular and intermittent visits to the company's office which would have led to the business of the company being adversely affected "if we had to wait on the Claimant to attend before making payments by cheques".

[20] Further, he states, that by a return of allotment to the Companies Office dated April 29, 1999, Kathleen Chambers purported to allot 186 of the first Defendant's shares to herself contrary to that Company's Articles of Association. No shares were offered by her to the second and third defendants. Importantly, since the death of Kathleen Chambers on December 8, 2007, asserts this deponent, he has seen documents filed in the Companies Office coupled with returns for the years 1999 – 2003, "all of which appear to bear my signature but which I did not sign".

[21] Furthermore, he avers, that he has disclosed to the Claimant all the documents that are in his possession pursuant to the Order of the Court.

[22] Finally, in relation to the Claimant's Notice of Application to amend, the Defendants have no objection thereto provided they are allowed is allowed to see the particulars of Claim in respect thereof and not the amended Claim Form only.

[23] The Claimant has placed reliance on a panoply of cases in support of her Application to amend his statement of case and at the same time to refute the Application to amend the statement of case by the Defendants –

- a) **Moo Young & Another v Chong & Others** (2000) 59 W.I.R. 369.
- b) **National Housing Corporation v DANWILL Construction Limited, Warren Sibbles & Donovan Hill**, Claim No. HCV 00361 and HCV 000362/2004
- c) **Campbell v National Fuels & Lubricants**, Claim No. C.L. 1999/C262, November 2, 2004.
- d) **Peter Salmon v Master Blends Feeds Ltd.**, CL 1991/S163
- e) **National Housing Trust v Y.P. Seaton & Associates Co.**, HCV 05733/2009.
- f) **Copper v Smith**, 26 CL. D 700.
- g) **The Attorney General v Maurice Francis**, unreported S.C.C.A. 13/95.
- h) **Robert Cartrade & Others v Pan Caribbean Financial Services Ltd. & Others**, HCV 02956/2006.
- i) **Rondel v Worsley** (1997) 3 ALL E.R. 993.
- j) **Ketteman v Hansel Properties Ltd.** (1998) ALL E.R. 38.
- k) **GL Baker Ltd v Medway Building & Supplies Ltd.**, (1958) 3 ALL E.R. 5-1.
- l) **Easton v Ford Motor Co**; (1993) 4 ALL E.R. 257.
- m) **Charlesworth v Relay Roads** (1999) 4 ALL E.R. 397.
- n) **Shaquille Forbes (An Infant b.u.k. Kadina Lewis) v Ralston Baker And Others**, HCV 0293/2006.

[24] In addition to the above the Claimant has prayed in aid Rule 68.13 of the Civil Procedure Rules, 2006 (amended) and the textbook authority of Gower's Principles Of Modern Law, 6TH Edition.

[25] The Defendants for their part reposed on the Charlesworth authority, **Percival v Wright** (1902) 2 Ch. 421 and on Part 20 of the Civil Procure Rules, 2006 (amended).

[26] By the way of comment I point attention to what I consider to be the real vexation: mutual mistrust and distrust.

[27] The Claimant bemoans that the spectre of delay in the trial of this matter is as a direct result of dubious manoeuvres by the Defendants. Viewed through the lens of suspicion, the Claimant disputes whether the second and third defendants, the brother and nephew of the late Kathleen Elfreda Chambers Smith, respectively, were properly appointed as Directors in this Claim.

[28] Second, whether the second and third Defendants were shareholders of the first defendant company.

[29] Third, whether the second and third Defendants took control of the affairs of the company to the exclusion of the Claimant and in the process of so doing managed to have their names added to the Company's bank accounts which previously were in the sole name of Kathleen Chambers-Smith, up to the time of her death.

[30] Finally, that it was after the dismissal of an appeal by the Court of Appeal in a related matter which had been brought by the Defendants against the Claimant, the Defendants filed their Notice of Application to amend on 10th December 2012.

[31] From this stated fact the Claimant invites the implication that the Defendant's application is yet another inauthentic act that it is calculated to forestall the trial of this case. Suspicion apart, it is the principles of law that will be determinant of the issues raised herein.

THE LAW

[31] I certainly do not propose to engage every presented case. It suffices were I to state the general principles gleaned from them. However, before I do so, I think it is apposite that we bear in mind this poignant observation: "...that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a

party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicate that the amendment should be permitted”: per Neuberger, J (as he then was) in **Charlesworth v Relay Roads Limited** [1999] 4 ALL E.R. 397 at p.402.

[33] The above quote which was adopted by Neuberger, J came from views expressed by Millett, L.J. in **Gale v Superdrug Stores plc.** [1996] 3 ALL E.R. 468 which also bears worth repeating: “The administration of justice is a human activity and accordingly cannot be made immune from error. When a litigant or his advisor makes a mistake, justice requires that he be allowed to put it right, even if this causes delay and expense, provided it can be done without injustice to the other party. The rules provide for misjoinder and nonjoinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted”.

[34] As noted by Brett, M. R. in **Clarapede & Co., v Commercial Union Association** (1883) 32 W.R. 262 at 263, “However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs”.

[35] Formerly, under the pre-2006 Civil Procedures Rules, (CPR), “The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became know after the date of that case management conference”: Rule 20.482 of the CPR 2002.

[36] The harshness of the above rule bore the invidious import of shutting a litigant out of litigation. Undoubtedly, this fact wrought such severe consequences which were not in keeping with the overriding objective of dealing justly with a case especially where the primary purpose of the civil courts is to decide any given case on its merits. Consequently, the CPR was amended in 2006 and apropos of Rule 20.4(2) it now reads that, “statements of case may only be amended after a case management conference with the permission of the court”. The permission granted to the court is of course discretionary but this discretion is exercised in accordance with the overriding objective, bearing in mind the policy behind the CPR.

[37] On general principles, the court has a discretion to permit amendments where it is just and proportionate to do so. If no arguable claim is raised by a proposed amendment permission will be refused. Where the cause of action accrues after the commencement of proceedings, the modern approach to an application to amend the statement of case is to grant it in accordance with the justice of the case. It is also permissible to allow amendments by adding heads of claim which have arisen after the proceedings were commenced: **British Credit Trust Holdings v UK Insurance Ltd.** [2003] EWHC 2404 (COMM), LTL 28/10/2013.

[38] Additionally, there is a public interest in allowing a party to deploy its real case provided it is relevant and has a real prospect of success: See **Cook v News Group Newspapers Ltd.** (2002) LTL 21/5/02.

[39] I shall here now attempt a summary of the principles extracted from judicial decisions. An amendment to a statement of case will be allowed in certain circumstances foreshadowed below.

Where a litigant makes a mistake or omission in his pleadings: **Clarapede & Co.**, case, **Gales’s** case and **NHDC’s** case, supra.

[40] The proposed amendment will be allowed where it did not yield to the Applicant any unexpected advantage or in any way prejudice the other side: **Shaquille Forbes’** case, supra.

[41] It will also be allowed where the proposed amendments seek to give greater particularity to and, clear legal definition of, the assertion concerning procedural irregularities, errors of law and excess of jurisdiction which the party alleges occurred in the conduct of the proceedings.

[42] If the proposed amendment can be made without injustice to the other side and the other side can be compensated in costs: **Clarapede's** case and **NHDC's** case, supra.

[43] Where the discretion to permit amendments is just and proportionate and where an arguable claim is proposed or there is a real prospect of success of the proposed amendment; **Robert Cartrade's** case, supra. Conversely, it will not be allowed, where the claim is frivolous and vexatious or is an abuse of the process of the court.

[44] Where the proposed amendment has a real prospect of success the court should consider whether it should allow the applying party to proceed with the amendment or to deny such a party that opportunity to do so and so leave that party with the option of filing a claim: **Robert Cartrade's** case.

[45] The proposed amendment will not be allowed if the purpose is to supply a deficiency in the pleading: **Moo Young & Others** case, supra. Further, where the proposed amendments are being made in bad faith and is an attempt to adjust the defence to meet the evidence given by the other party.

[47] Based on the principles adverted to above, I am prepared to say, in view of the obvious outstanding issues which exists between the parties, that both applications ought to be allowed. As such the trial dates of June 16, 17 and 18, 2014 be vacated and that new case management orders be made. The respective costs engendered by each application cancel out each other and are to be borne by each applicant.

