[2020] JMCC COMM 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD0115

BETWEEN	**VINCENT CHANG**	**CLAIMANT/APPLICANT**
AND	**COLIN COOKE**	**1st DEFENDANT/RESPONDENT**
AND	**C.C.L. LIMITED**	**2ND DEFENDANT/RESPONDENT**

IN CHAMBERS

ORAL JUDGMENT

Mr. John G. Graham Q.C. and Miss Peta-Gaye Manderson instructed by John G. Graham & Company for the Claimant/Applicant

Miss. Stephanie Ewbank instructed by Levy Cheeks Attorneys-at-Law for the Defendants/Respondents

Heard: October 27, November 12 and 24, 2020

Civil practice and procedure– Application to add defendant to the claim–Civil Procedure Rules 2002, as amended; Rules 19. 2 & 3– Significance of relevant Limitation period in the context of Rule 19.4 and the Limitation Act

PALMER HAMILTON, J

BACKGROUND

[1] This is an application by the Applicant to add Ms. Diana Cooke (hereinafter "Ms. Cooke") as a defendant to the Claim herein. Ms. Cooke is the wife of the 1st Respondent and is a director and secretary of the 2nd Respondent.

[2] The substantive Claim was initiated by way of Fixed Date Claim Form whereby the Applicant sought, inter alia, declarations pursuant to section 213A of the Companies Act that the 1st Respondent exercised his power or has conducted the affairs of the 2nd Respondent in a manner that is oppressive or unfairly prejudicial to the Applicant both in his capacity as a director and a minority shareholder of the 2nd Respondent.

[3] The parties herein provided written submissions and I am grateful for their industry.

SUBMISSIONS

[4] The Applicant relied primarily on the 2nd and 3rd Affidavits of the Applicant in support of this application. Mr. Graham also referred to the Affidavits of Mark Jennings and Miss Cooke. The crux of the Applicant's submissions is that there is enough material before the Court which shows that Ms. Cooke is a proper defendant to be joined in order to deal with several matters, these matters being: -

1. The 2nd Respondent's primary asset, that being premises at 48 Constant Spring Road, Kingston 8 was mortgaged in favour of First Caribbean International Bank (Jamaica) Limited as security for a personal loan to the 1st Respondent. Ms. Cooke also executed the said mortgage deed with the 1st Respondent. This action was averred by learned Q.C. Mr. Graham as an egregious breach of her obligation as an officer of the company;

2. A proper reading of the mortgage by way of guarantee to secure the 1st Respondent's personal loan was not limited to the sum of US$192.000.00 and could have been increased/extended by the bank and other loan advances could have been taken. By being one of the signatories to the Guarantee, Ms. Cooke as a co-director should have been vigilant to ensure that the liability of the company would not extend beyond what it should;

3. The 1st Respondent acting on behalf of the 2nd Respondent entered into an agreement to purchase an interest in land, namely, a right of way from Ms. Cooke, and the 1st Respondent's step-daughter. This was done without disclosing her interest or her husband's interest and was a fiduciary breach of her duty as a director;

4. Ms. Cooke occupied one of the units on the property owned by the 2nd Respondent for which she paid no rent and subsequently rented said unit and kept the rental income for herself;

5. There is an alleged admission from the 1st Respondent contained in a letter dated September 12, 2002 that Ms. Cooke was collecting rent and not paying it over. The 1st Respondent therein proposed that these sums be deducted from his salary. This is clearly a conflict of interest with her position as a director.

[5] Mr. Graham Q.C. indicated that it is appropriate that Ms. Cooke be joined at this juncture to avoid a multiplicity of legal actions and to allow her to have her position and rights ventilated in one hearing. It was further submitted that her stewardship in relation to the activities mentioned above and the fact that she acted in complicity with her husband can only be explained after she is joined in the matter. A joinder would prevent any adverse inferences to be drawn about her conduct without giving her the opportunity to respond. This would be in keeping with the principle of due process and the right to be heard. The case of **Estera Trust (Jersey) Ltd and anor v Jasminder Singh and others** 2018 EWHC 1715 (ch) was used to support his submissions.

[6] Learned Counsel for the Respondents Ms. Ewbank averred that it is a relatively late stage for the Applicant to seek to add a defendant and this would have the effect of extending the entire time frame of the case and increase costs. She further stated that the Applicant is relying on rule 19.2 (3) of the Civil Procedure Rules,

2002, as amended (hereinafter "CPR") and by virtue of the threshold prescribed by the said rule, the relevant limitation period would not have been current at this time.

[7] Learned Counsel relied on the case of **Maurice v Alles** 2016, ONCA 287 which was applied in **Zhao v Li** 2020 ONCA 121 and asked the Court to draw a distinction between singular oppressive acts and ongoing oppressive acts. She quoted paragraph 49 as follows: -

> *"Courts must be careful not to convert singular oppressive acts into ongoing oppression claims in an effort to extend limitation periods. To do so would create a special rule for oppression remedy claims."*

[8] Ms. Ewbank indicated that no ongoing oppression has been alleged by the Applicant in respect of Ms. Cooke, therefore, the limitation period is not satisfied and rule 19. 2(3) cannot be satisfied. Learned Counsel stated that the law of Jamaica does not prescribe limitation to shareholder oppression claims however the law of tort applies pursuant to the Limitations of Actions Act 1623.

[9] Learned Counsel also pointed out that the submissions of the Applicant are diametrically opposed to the information contained in his 3rd Affidavit. This is so as in that Affidavit, the Applicant indicated that he recommended the 1st Respondent to approach First Caribbean International Bank (Jamaica) Limited to secure the mortgage on the premises owned by the 2nd Respondent but in his submissions, he disclosed that he did not know about said mortgage until he filed the substantive Claim. Miss Ewbank also indicated that there were several correspondences sent to the Applicant that spoke to the mortgage and so he was well aware of same from as far back as 2005.

[10] In relation to the mortgage by guarantee, Learned Counsel indicated that it is of no moment in these proceedings as the loan was completely paid off and it is no longer in force. Ms. Ewbank indicated that Ms. Cooke signed this instrument in the capacity as a secretary and not as a director of the company and section 213A of

the Companies Act does not warrant a company secretary to be joined in an oppressive claim.

[11] In relation to the issue of the right of way, Ms. Ewbank contended that this is not currently pleaded in the Claim as it stands as only the 1st and 2nd Affidavits of the Applicant stands as evidence. Even if the 3rd Affidavit is allowed to stand as evidence, the issue of the right of way is not pleaded but just refereed to.

[12] Mr. Graham, Q.C. in response to the authority of **Maurice v Alles** (supra), averred that the Canadian Limitations of Actions Act differs from our Limitations of Actions Act and the two (2) have no similarities.

LAW AND ANALYSIS

[13] Part 19 of the CPR deals with the addition and substitution of parties. Rule 19. 3 (2) permits the claimant to apply to add a defendant to the claim. Rule 19.2 (3) outlines the circumstances in which the court may add a new party to proceedings. One such circumstance being if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings.

[14] Learned Counsel for the claimant raised the issue that the Applicant may be barred from adding Ms. Cooke to the Claim as the relevant limitation period would not be relevant. Usually, the reliance on the provisions of the Limitation of Actions Act as a defence to a claim, is to be demonstrated at a trial. However, a defendant may also rely on a limitation of actions point if the claimant seeks to amend his claim to add a party or to seek a remedy, which the proposed party, or the defendant, asserts is time barred. The issue of relevant limitation period in shareholder oppressive cases involves a number of issues of law, some of which are not free from uncertainty.

[15] However, even if I were to find that the relevant limitation period has expired, it does not preclude the addition of the proposed defendant Ms. Cooke. The directives under Rule 19.4 would thereby apply in the circumstances and the

considerations under the case of **Maurice v Alles** (supra) would not be pertinent. Although the application was made under rule 19. 3 the Court is invoking its inherent jurisdiction to bring the application under rule 19.4 for the reasons previously stated.

[16] The central issue therefore to be determined is whether the addition of Ms. Cooke was necessary for the Claim to be properly carried on against the existing parties. In the case of **Administrator General v Metropolitan Parks and Market Ltd** (unreported) Supreme Court, Jamaica, Claim No. A 100 of 2000, judgement delivered March 31, 2009, Straw J cited the English case of **Martin v Kaisary** [2005] EWCA Civ 594 where the decision of the Court was based on the application of the facts of the English CPR rule 19.5(2) and (3) (b). These sections are of equivalent provisions in relation to Rule 19.4(3). She stated: -

> *"In relation to these provisions, Smiths LJ stated as follows (page 5): They allow a party to be brought into an action but deprive him of an accrued limitation defence. The potential for injustice must be borne in mind when interpreting the rule itself and when exercising the discretion to allow addition or substitution."*

[17] However, considering the circumstances of the case at bar, I am persuaded by the dictum in the case of **Ramon Barton, & Wilburn Barton v John McAdam, et al** (unreported), Supreme Court, Jamaica, Claim No. C L 1996 B 110, judgment delivered the 24th day of May 2005. At page 8 of that case, the Honourable Mrs. Justice Sinclair-Haynes (Ag) (as she then was), in considering whether to allow an amendment, referred to the following dictum of Dyson LJ in **Parsons & Anor v George & Anor** (2004) EWCA Civ. 912 at paragraph 9: -

> *"…there are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after expiry of the relevant limitation period. A common example of such a case is where the defendant has made a genuine mistake and named the wrong defendant, and where the correct defendants have not been misled and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence)."*

[18] The court recognizes that justice will be best achieved and the Court's resources more efficiently utilized when all the parties are before the court. Having given due

consideration to the nature of the substantive proceedings I agree with the submissions of Learned Q.C. Mr. Graham that the oppressive actions complained of against the defendants involve Ms. Cooke at each stage. I garner from the authority of **Mutual Security Merchant Bank Trust Ltd v Marley** (1991) 28 JLR 670 *"the joinder must enable the Court effectually and completely to adjudicate and settle all questions in the originating summons for directions by the appellants*".

[19] In my view the discretion granted under rule 19.4 is designed to ensure that all matters between the parties are completely and finally determined and avoid a multiplicity of Actions/Claims. In my judgment, the ends of justice will be best served if all the parties to a dispute are brought before the court so that the decision will bind all of them. In my view, Ms. Cooke appears to be sufficiently implicated through documentary evidence in the unfairly prejudicial conducts being alleged by the Applicant so as to warrant the relief being sought by the Applicant being granted against her. Allowing the Applicant, to add Ms. Cooke as a defendant, will allow the court at trial, the ability to resolve the issue of shareholder oppression. The addition of Ms. Cooke is necessary in order to continue or prove the action against either the 1st and/or 2nd Respondent. I would grant the application on that ground.

[20] Furthermore, the pleadings and Affidavits herein made much mention of Ms. Cooke's intimate involvement in the acts complained of by the Applicant. I therefore cannot find that she would have been misled and thereby made to suffer any prejudice if she is added as a party to the Claim. If I were to accept that the relevant limitation is not current, the only prejudice that Ms. Cooke may be said to suffer is the loss of her limitation defence as indicated previously. I am again guided by the dictum of the Honourable Mrs. Justice Sinclair-Haynes (as she then was) at page 7 of the case of **Ramon Barton & Wilburn Barton v** John McAdam, et al (supra) where she said that: - *"it is settled law that the loss of a limitation defence is not an aspect of prejudice that the court should take into consideration."*

[21] While I agree that the Applicant is tardy in making this application, I am guided by the dictum at page 14 of **Ramon Barton, & Wilburn Barton v John McAdam, et al** (supra) where he stated: -

> *"…Dilatory conduct however censurable does not per se preclude the court from exercising its discretion to allow such an amendment."*

[22] The general rule is that costs follow the event/successful parties. However, I find that there are exceptional circumstances that would warrant a departure from the normal rule. Rule 64.6 (2) directs that the Court may order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs. I gave particular regard to rule 64.6 (4) (e), that is the manner in which the Applicant has pursued the application herein. There was no explanation as to the reason why Ms. Cooke was not added as a party in the original application. The application made at this juncture in the proceedings has caused a significant increase in the length of the proceedings and resulted in trial dates being vacated. I also gave due regard to rule 11. 3 (2) which states that: -

> *"Where an application is made which could have been made at a case management conference or pre-trial review the court must order the applicant to pay the costs of the application unless there are special circumstances."*

[23] This rule essentially mirrors rule 65.8 (3). In light of the above I am of the view that the application herein is one that warrants a departure from the normal rule. Consequently, I will make the following Orders.

ORDERS AND DISPOSITION

1. That Diana Cooke be added as a defendant to this Claim.
2. Costs of this application to the Respondents to be taxed if not agreed.
3. Applicant's Attorney-at-Law to prepare file and serve Orders made herein.