[2021] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00013

BETWEEN	**JUICI BEEF LIMITED (TRADING AS JUICI PATTIES)**	**APPELLANT**
AND	**YENNEKE KIDD**	**RESPONDENT**

Written submissions filed by Myers, Fletcher & Gordon for the appellant

Written submissions filed by Green & Company for the respondents

4 June 2021

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] I have read in draft the judgement of my sister, Straw JA. I agree with her reasoning and conclusions and have nothing useful to add.

STRAW JA

Introduction

[2] This is an appeal against the order of Master Mott Tulloch-Reid ('the learned master') wherein she refused the appellant's application (filed 18 September 2019)

seeking (1) permission to amend its defence, (2) substitution of itself for another defendant, as well as challenging her summary assessment of costs. The precise terms of the order (made on 19 January 2021) being challenged are as follows:

> "1. The Defendant is not permitted to file and serve an Amended Defence in the claim.
>
> 2. The Defendant is not permitted to substitute Elite Restaurants Limited in its place in the claim herein.
>
> 3. Costs of the Application in the amount of $295,000.00 are to be paid by the Defendant to the Claimant on or before March 26, 2021
>
> 4. The Defendant's Application for leave to appeal is granted
>
> 5… ."

Background

[3] The appellant, Juici Beef Limited (Trading as Juici Patties) ('Juici') was named as the sole defendant in the claim filed by the respondent, Yenneke Kidd ('Ms Kidd') on 15 April 2015. Ms Kidd is seeking damages for personal injury and loss arising from Juici's alleged negligence and/or breach of their duty under the Occupiers' Liability Act.

[4] Ms Kidd's claim is that on 17 June 2011, she visited Juici's restaurant, located at 31C Constant Spring Road in the parish of Saint Andrew ('the premises'), and upon opening the door, she suffered serious injuries to her right foot.

[5] Juici responded to the claim by filing its acknowledgment of service in June 2015, and defence on 9 July 2015. The essence of Juici's defence was that it was the occupier of the premises, but it was not liable to Ms Kidd. Juici alleged that:

i. it took reasonable care to ensure that the premises were safe for visitors;

ii. the door was at all times in safe working condition; and

iii. insofar that Ms Kidd was injured (which was not admitted), she was the author of her own misfortune.

[6] In or about 2019, Juici changed its legal representation and its current legal representatives (Messrs Myers, Fletcher and Gordon) sought the court's permission to make amendments to the pleadings and a notice of application for court orders was filed on 18 September 2019.

[7] Juici indicated (through an affidavit sworn to by its officer, Romona Morgan, filed in support of the application) that after the defence was filed, it subsequently noticed that there were significant deficiencies, in that the defence:

i. contained an erroneous admission that Juici was the occupier of the premises where Ms Kidd's injuries were sustained, when in fact, Juici never had possession or control of the premises; and

ii. did not disclose that Elite Restaurants Limited ('Elite') was at all material times, the occupier of the premises and that Elite had entered into a franchise agreement with Juici, which permitted them to use Juici's brand and sell its products.

[8] Consequently, it was contended (before the learned master) that without the court's permission to amend the deficient defence, Juici would be severely prejudiced in defending the claim. Additionally, the court would not be able to justly dispose of the claim, as the information before it would be inaccurate. Further, in respect of its quest for a substitution, it was contented that Elite was the only appropriate entity against whom the claim could be carried, as it was the occupier of the premises.

The findings of the learned master

[9] There were no written reasons provided by the learned master in respect of her decision. As a part of Juici's notice of appeal, it included the following findings of the learned master, which it seeks to challenge:

> "a. On the Application to Amend the Defence:
>
> i. The Court is not able to assess the Defendant's prospect of succeeding on the proposed amended Defence without reviewing the Franchise Agreement.
>
> ii. The Defendant must annex all documents it intends to rely on to its Defence and based on the evidence of Ms. Alyssa Chin the franchise agreement cannot be located therefore the Defendant cannot comply with this requirement.
>
> iii. The Defendant can renew its application if the Franchise Agreement is found.
>
> b. On the Application to Substitute the Defendant:
>
> i The Court would need to see the specific terms of the franchise agreement to assess whether the Applicant is properly joined as the Defendant in the Claim; and
>
> ii The Defendant cannot tell the Claimant who to sue, the Claim Form is the Claimant's Document and is not to be manipulated by the Defendant."

[10] No issue was taken by counsel for Ms Kidd in respect of Juici's representation of the learned master's findings. In fact, their submissions in response (filed 26 February 2021) are confirmatory of the accuracy of the representation.

The grounds of appeal

[11] Juici has structured its grounds of appeal by reference to the orders in relation to the issues of the amendment, substitution and costs. The grounds are as follows:

> "a. On the Application to Amend the Defence:

i. The learned Master misunderstood, or failed to give proper weight to, the evidence before her tending to support the facts pleaded in the proposed Amended Defence, specifically that Elite Restaurant's Limited was, at the material time, the occupier of the premises that is the subject of the Claimant's claim for damages for personal injuries made pursuant to the Occupier's [sic] Liability Act and the common law of Negligence.

ii. The learned Master misunderstood the law and/or the evidence before her in concluding that the Court is not able to assess the prospect of success of the Appellant's proposed Amended Defence, which seeks to dispute that the Appellant was the owner or occupier of the premises at the material time, without first reviewing the terms of the Franchise Agreement between the Appellant and Elite Restaurants Limited ("the Franchise Agreement").

iii. The learned Master misunderstood the law and/or the evidence before her in finding that the Terms of the Franchise Agreement, to which the Claimant was not a party, may be relevant to the Claimant's claim against the Defendant for damages for personal injuries made pursuant to the Occupier's [sic] Liability Act and the common law of Negligence.

iv. The learned Master misunderstood the law by concluding that rule 10.5(6) of the Civil Procedure Rules mandates the Defendant to annex all documents it intended to rely on, to include the Franchise Agreement, to its Defence.

b. On the Application to Substitute the Defendant:

i. The learned Master misunderstood the law and/or the evidence before her in concluding that the Court is not in a position to determine whether it is necessary, within the meaning of rule 19.4 of the Civil Procedure Rules, to substitute Elite Restaurants Limited in the place of the Appellant as the Defendant in the claim before the Court below without first reviewing the terms of the Franchise Agreement.

ii. The learned Master misunderstood the law, specifically, rules 19.3 and 19.4 of the Civil Procedure Rules, in concluding that the application to substitute the Defendant could not properly be pursued by the Defendant.

c. On the issue of Costs:

i. The learned Master erred in proceeding to conduct a summary assessment of costs and ordering the Defendant to pay costs in the sum of $295,000.00, in that the Court proceeded to assess costs on its own motion:

1. without an application by, or representations from, the Claimant concerning *the time that was reasonably spent in making the application and preparing for and attending the hearing or otherwise dealing with the matter* as required under rule 65.9(1); and

2. without the Claimant supplying the Court and the Defendant with the statement required by rule 65.9(2)."

Ground a - application for the amendment of the defence – Did the learned master err in not granting the application?

Submissions on behalf of Juici

[12] Counsel, in written submissions, stated that the need for the proposed amendments was set out in the affidavit of Romona Morgan in support of the application (filed 19 September 2019) and attached was a draft of the proposed amended defence. The amendments sought to address the "significant deficiencies" which were detailed in paragraph [8] above, namely the erroneous admission that Juici was the occupier of the premises; and the failure to disclose the true occupier, Elite.

[13] Reference was made to a second affidavit filed in support of the application, that is the affidavit of Alyssa Chin (filed 13 October 2020) ('the Chin affidavit').

[14] The Chin affidavit explained that in or about October 2002, Juici entered into a franchise agreement with Elite. It was alleged that the terms of that agreement included that Elite would retain daily management responsibilities for its restaurant businesses,

entirely independent of Juici, for the location of these businesses whether through properties it owned or leased from third-parties. A copy of the said agreement could not be located.

[15] Counsel made reference to the following documents exhibited to this affidavit:

(a) a copy of Elite's annual returns for 2020, showing that the company is active;

(b) correspondence and invoices between Juici and Elite, showing their course of dealings with each other;

(c) the certificate of title for the premises, showing it was owned by another entity (Chevron Caribbean SRL);

(d) a lease agreement between Chevron Caribbean SRL and Elite, showing that effective 1 May 2009, Elite leased the premise for an initial three-year period (see clause 3.1), allowing Elite to put up signage in accordance with "the franchise program of Juici Patties" (see unnumbered clause 2), and allowing Elite to operate a Juici Patties Restaurant "to sell items on [the] Franchiser's menu" (see clause 6.1); and

(e) a memorandum dated 1 November 2013, showing that Juici terminated its franchise agreement with Elite.

[16] Counsel for Juici contended that the two questions before the learned master were - (i) whether a factual basis existed for the proposed amendments; and (ii) whether the proposed amendments would assist the court in determining the real questions in controversy between the parties. It was submitted that both questions ought to have been resolved affirmatively and the amendments to the defence allowed.

[17] These questions were clearly framed by reference to the decision of Brooks J (as he then was) in **National Housing Development Corporation v Danwill Construction Limited et al** (unreported), Supreme Court, Jamaica, Claim Nos 2004HCV000361 and 2004HCV000362, judgment delivered 4 May 2007 wherein he considered an application made under rule 20.4 of the Civil Procedure Rules ('CPR') and, ultimately, granted the defendant's application to amend its statement of defence.

[18] It was contended that the learned master erred:

i. in law by considering the incorrect legal standard. Her finding that she was unable to assess whether the proposed defence had a real prospect of succeeding without seeing the franchise, was incorrectly premised. Rather, she should have considered the proper standard which is whether there existed an arguable factual basis for the proposed defence; and

ii. by misconstruing the evidence before her and thereby failing to appreciate that the evidence established an arguable factual basis for the amendments sought.

<u>The franchise agreement and Juici's duty to set out its case</u>

[19] Further, it was submitted there was a failure to give sufficient weight to the unchallenged evidence contained in the Chin affidavit (detailed in paragraph [15], above) while placing too great a reliance on the possible terms of the franchise agreement. The precise terms of the franchise agreement were irrelevant to the dispute between the parties – the issue being whether Juici was at the material time in occupation or control of the premises, in order to establish liability under the Occupiers' Liability Act and/or a duty of care in negligence.

[20] It was contended also that the learned master erred in her finding, relevant to rule 10.5(6) of the CPR, for two reasons. Firstly, that rule requires necessary documents to be identified or annexed. Therefore, the fact that the franchise agreement cannot be located and thereby annexed is not a proper basis to refuse the application for amendments. Secondly, Juici does not consider the actual franchise agreement to be a necessary document within the meaning of rule 10.5(6) as it does not seek to rely on it; and Juici had annexed other documents which provided evidence of the franchise agreement between Juici and Elite.

[21] Finally, the refusal of the application for the amendment poses serious irremediable prejudice to Juici. This is so for the reasons that the pleadings as they currently stand, do not place the relevant issues before the court and the learned master's refusal to allow the amendments to the defence, has neutered Juici's defence as it cannot ethically advance the position reflected in its pleadings, as it now knows them to be inaccurate; and by virtue of rule 10.7 of the CPR, it would be prevented form relying on allegations or making factual arguments to advance its position which are not set out in its defence.

Submissions on behalf of Ms Kidd

[22] It was contended that the learned master was correct in her refusal to allow the amendments to the defence. The supporting submissions were essentially threefold.

[23] Firstly, the amendments constitute fundamental changes and essentially amount to the filing of a new defence after the expiration of the limitation period (ie 16 June 2017). Reliance was placed on the decision of Sykes J (as he then was) in **Peter Salmon v Master Blend Feeds Limited** (unreported), Supreme Court, Jamaica, Suit No CL 1991/S163, judgment delivered 26 October 2007 in support of the contention that, outside of the limitation period, only amendments that seek to give greater detail of the matters pleaded should be allowed. Amendments which seek to include a new claim should be disallowed.

[24] It was acknowledged that the decision in **Peter Salmon** related to a claimant who, unsuccessfully sought to amend the claim, to include a new injury after the relevant limitation period, but it was argued that the same rationale should be applied. Reference was also made to the pre-CPR case referred to by Sykes J in his decision, **Judith Godmar v Ciboney Group Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 144/2001, judgment delivered 23 March 2000 as well as the decision of Fraser J (as he then was) in **National Housing Trust v YP Seaton & Associates Company Limited** (unreported), Supreme Court, Jamaica, Claim No 2009HCV05733, judgment delivered 31 March 2011.

[25] Secondly, the learned master was correct in her reasoning that the franchise agreement was critical to the court's assessment of Juici's prospect of success on the proposed amended defence. Without this franchise agreement, the court would be left to speculate on its terms, and in particular any term relating to liability.

[26] Third and finally, it was submitted that pursuant to the overriding objective, specifically rule 1.1(2)(c)(iv) of the CPR, the court must take into consideration the financial position of each party. In the case at bar, the parties are on unequal financial footing by virtue of the fact that Ms Kidd is an individual, whereas Juici is a company. The inordinate delay caused by Juici has resulted in immeasurable financial loss to Ms Kidd, and this injustice cannot adequately be remedied with costs.

Standard of review of the exercise of the learned master's discretion

[27] It is convenient to indicate at the outset that regard was had to the well-settled principle that this court must defer to the exercise of discretion by a judge (or master) and must not interfere with it merely on the ground that the members of this court would have exercised the discretion differently. As such, this court will only set aside the exercise of a discretion by a judge (or master) where it was (i) based on a misunderstanding of the law or evidence; (ii) based on an inference which can be shown to be demonstrably wrong; or (iii) so aberrant that no judge regardful of his duty to act judicially, could have reached it (see **Hadmor Productions Ltd and others v Hamilton and another**

[1982] 1 All ER 1042, 1046 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paragraphs [19] and [20]).

Analysis on ground a

[28] It is acknowledged that the exercise of the court's power to allow an amendment to the statement of case after a case management conference ('CMC') (per rule 20.4(2) of the CPR) is entirely discretionary and must be guided by the overriding objective (per rule 1.2 of the CPR). As Sykes J observed in **Peter Salmon**:

> "22. The amended rule 20.4…confers powers of amendment on the court…[that rule] has not laid down any precondition or stated criterion for the exercise of the discretion. This means that the application of the rule is governed exclusively by the overriding objective."

[29] Although it is well-known, it bears repeating that the overriding objective entails dealing with cases justly and this includes considering the complexity of the issues, and ensuring that cases are dealt with expeditiously and fairly, and an appropriate share of the court's resources are allotted (per rules 1.1(c)(iii), 1.1(d) and (e) of the CPR). In **National Housing Development Corporation**, a first instance authority relied on by counsel for Juici, Brooks J quoted a passage from Stuart Sime's text – A Practical Approach to Civil Procedure (7th edn at page 145) which expands on the concept of dealing with cases justly, in the context of an amendment being sought:

> "A court asked to grant permission to amend will therefore base its decision on the overriding objective. **Generally dealing with a case justly will mean that <u>amendments should be allowed to enable the real matters in controversy between the parties to be determined</u>.**" (Emphasis added)

[30] While this principle is correct, in recent rulings of this court, there has been an expansive understanding of the factors that are to guide a court in its deliberations, as to whether to allow an amendment (see **Jamaican Redevelopment Foundation, Inc**

v Clive Banton and anor [2019] JMCA Civ 12 per McDonald-Bishop JA, at paragraphs [26] and [27]).

[31] Based on information set out in the written submissions of counsel for Ms Kidd, the CMC was held on 5 April 2017, pre-trial review was set for 19 September 2019 and trial dates were secured for 25 to 27 November 2019. A perusal of the minute sheets obtained from the Supreme Court registry, reveals that the application, which came before the court on 19 September 2019, was adjourned to 27 April 2020, the trial dates vacated and new trial dates set for 29 to 31 July 2024.

[32] It appears, however, that the hearing of the application before the learned master commenced on 14 October 2020 and was adjourned to 4 November 2020. The actual orders were then made on 19 January 2021. Although the amendment sought was about four years after Juici's statement of case had been settled, it could not be said that it would delay or affect the trial of the claim, as the trial dates were now set for July 2024.

[33] Having considered the submissions and the factual circumstances of the case at bar, this court cannot defer to the exercise of the learned master's discretion. This is so, primarily, because it was based on a misunderstanding of the law, the CPR, as well as the evidence. There is merit in the submissions of counsel for Juici in relation to ground a (i) to (iv).

[34] Counsel for Juici submitted that the learned master erred, insofar that she sought to conduct an assessment as to whether the proposed amendments demonstrated a defence with a prospect of success. While the prospect of success has greater relevance at a late stage of the proceedings, the learned master would not have necessarily erred in a consideration of the issue as one of several factors to be considered. As McDonald-Bishop JA stated at paragraph [26] vii of **Jamaica Redevelopment Foundation, Inc**, referencing one of several principles distilled from some relevant authorities by the learned authors of the text, Zuckerman on Civil Procedure Principles of Practice Third Edition, 2013, pages 309-312:

> "The interests of justice would not be advanced by amendments that are bound to fail on the merits and so, the court will allow an amendment only if it has a reasonable prospect of success."

[35] The same authors noted that the authorities have shown that applications to amend, must necessarily turn on the particular facts of each case and so, no hard and fast rules are possible. Therefore, the outcome of an application to amend will depend on a fact-based assessment of various considerations, which may be relevant in light of the facts of the case (see **Jamaica Redevelopment Foundation, Inc**, paragraph [26] vi). The learned master was required to balance several competing considerations that would have arisen on the circumstances before her and then decide, which one was to be treated as the critical consideration in the light of the overriding objective. This was incumbent upon her, given her conclusion (based on findings of the learned master presented to this court by counsel for Juici) that she was not in a position, to determine whether the amended defence had any prospect of success.

[36] The learned master erred in the weight that she attached to that factor (real prospect of success), having regard to the stage of the proceedings and given the circumstances that were before her. It is just one factor to be considered among several, in giving effect to the overriding objective and ought not to be determinative or elevated to a single test for allowing an amendment. At the end of the day, the court's decision to grant or refuse the application to amend, should be reflective of the interplay of all relevant considerations, within the context of the overriding objective, as set out at rule 1.2 of the CPR.

[37] Guidance is to be had from the dictum of McDonald-Bishop JA at paragraph [126] of **Caricom Investments Limited**, concerning the necessity to weigh all relevant factors:

> "[126] It follows from the authorities that even though amendments should be allowed to enable the real matters in controversy between the parties to be determined, it is not, in and of itself, determinative of the matter since other factors

> have to be considered, including the stage of the proceedings. **Nevertheless, it is an important consideration to be weighed in the balance with other relevant considerations in determining where justice lies**…" (Emphasis added)

[38] Bearing in mind a defendant's duty to set out all the facts on which it seeks to rely in disputing the claim (per rule 10.5(1) of the CPR) and the fact that the amendment was not being made very late in the day, the learned master should have had as the foremost consideration (as the authorities have established), whether the amendments will "assist the court in determining the real questions in controversy between the parties" (per Brooks J at page 10 of **National Housing Development Corporation**). Naturally, the overriding objective will not be furthered by baseless or unnecessary amendments, as such it would always be prudent to conduct an assessment of whether there is "an arguable factual basis for the proposed amendment" (per Brooks J at page 10 of **National Housing Development Corporation**, interpreting an excerpt from paragraph 31.4 of Blackstone's Civil Practice, 2005).

[39] Based on the documents exhibited to the Chin affidavit, Juici would have disclosed sufficient material for a finding that there is an arguable factual basis for the proposed amendments. It cannot be said that the proposed amendments were merely allegations unsupported by evidence and tantamount to a back tracking on allegations of fact. The proposed amendment was also made within the context of an application to substitute a defendant. The possible involvement of a third party in the proceedings for the proper resolution of the case, would have warranted greater weight to be attributed to the consideration whether the amendment was necessary to assist the court in determining the real question in controversy between the parties. One of the fundamental questions to be determined at trial would be whether Juici was the occupier of the premises in question at the material time. The learned master would have erred on her apparent focus on the prospect of success of the amendment as the paramount consideration in the circumstances of this case. The ultimate question for her was what was required to deal with the case justly, having regard to all the circumstances.

The franchise agreement and Juici's duty to set out its case

[40] Rule 10.5(6) of the CPR provides:

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

[41] The learned master, in considering the defendant's duty to set out its case (per rule 10.5 of the CPR) applied too restrictive of an approach. The exercise of a discretion, based on the finding that the franchise agreement (that is the documentary evidence of a contract referred to in the defence) must be annexed/placed before the court in order to demonstrate that the defence has a prospect of success, might even be considered aberrant.

[42] It is correct that rule 10.5(6) of the CPR requires a defendant to identify or annex documents which it considers to be necessary to its defence, and that Juici, at paragraph 4 of its proposed amended defence, alleges:

> "The Defendant entered into a franchise agreement with Elite Restaurants Limited which permitted them to use the Defendant's brand and sell their products."

[43] However, the reference to the franchise agreement does not automatically require its annexation for two reasons. Firstly, rule 10.5(6) of the CPR is worded in the alternative, ie a defendant can identify a necessary document in its defence **or** annex it. In instances where a necessary document cannot be found (and thereby annexed) it does not follow that it cannot be identified or mentioned. In fact, rule 10.7 of the CPR spells out the consequence of not setting out one's defence:

> "The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."

[44] Secondly, the mention of the franchise agreement could be reasonably construed as a factual allegation, which would ultimately be for Juici to prove at trial. This could be

done by way of other documents some of which were exhibited to the Chin affidavit and were before the learned master for her consideration.

[45] It does not follow that Juici's ability to dispute the claim, by asserting in its defence that it was not the occupier of the premises, is contingent upon it locating the franchise agreement (that is the documentary evidence of a contract). This is particularly so, when it contends that is not relying on the specific terms of that agreement and there is other documentary evidence, which provides an arguable factual basis for the proposed amendment. It is of note also, that clause 11.2 of the said lease agreement (exhibited to the Chin affidavit) required Elite to "keep in force public liability insurance against claims for personal injury…occurring in or about the leased premises…".

[46] Further, there is the practical consideration, that if an amendment is granted to the defendant, it may require additional steps to be taken by other parties to ensure readiness for trial. As such, it is regrettable that the learned master encouraged Juici to renew its application, if the franchise agreement were to be found.

[47] The submissions of counsel for Ms Kidd and in particular, the cases relied on, are of limited assistance to this court. They relate to instances in which the claimant is seeking to amend its statement of case, and the danger of allowing a new cause of action to be added, outside of the limitation period. The operation of the limitation period may, seemingly, apply differently to a defendant who has new information come to its attention, subsequent to filing its defence but prior to the trial. There would be some unfairness in insisting that Juici should be bound by its pleadings, which it now knows to be based on inaccurate factual allegations, and for a trial to proceed on this basis. Further, it is the duty of all the parties to further the overriding objective (per rule 1.3 of the CPR).

[48] An explanation has been given for Juici's failure to initially plead the correct details, and although counsel for Ms Kidd has asserted that the delay has resulted in an immeasurable financial loss, she has not indicated why costs would not be a suitable remedy in the particular circumstances, where the application for amendment is not being

made at a late stage of the proceedings. In the face of such an application, whether the other party can be compensated in costs without injustice, is one of the several factors to be considered (see **Jamaica Redevelopment Foundation, Inc** at paragraph [26] iv).

[49] In all the circumstances, ground a has merit and the amendments ought to have been permitted.

Ground b - the application to substitute the defendant- did the learned master err in not granting the application?

Submissions on behalf of Juici

[50] Counsel for Juici submitted that the learned master erred when:

(a) she concluded that she was unable to evaluate whether it was necessary, within the meaning of rule 19.4 of the CPR, to permit the substitution of Elite in place of Juici without first examining the terms of the franchise agreement; and

(b) she determined that the application could not be made by Juici and it amounted to a manipulation of the pleadings.

[51] It is unnecessary to repeat the submissions in relation to the franchise agreement, as they have already been set out and discussed in relation to ground a above.

[52] Reference was made to rule 19.4 of the CPR and in particular, in what circumstances a substitution was "necessary" (per rule 19.4(2)(b)). It was contended that the application for the substitution of Elite in place of Juici fell within CPR 19.4(3)(a), that is Juici was named in the claim form in mistake for Elite. In support of this contention, the following cases were commended to the court for consideration - **Elita Flickenger v David Preble and Xtabi Resort Limited** (unreported), Supreme Court, Jamaica, Suit No CL 1997/F-013, judgment delivered 31 January 2005, **Evans Construction Co Ltd**

v Charrington & Co Ltd [1983] 1 All ER 310 and **Smithkline Beecham v Horne-Roberts** [2001] EWCA Civ 2006.

[53] It was contended that the learned master's task was to identify, based on the respondent's pleaded case and the evidence before her, which entity Ms Kidd intended to sue from the outset. This was answered by paragraph 2 of the particulars of claim, which states that the defendant was "at all relevant times occupier's of premises situate 31C Constant Spring Road…where they carried on the business of Restaurant trading as JUICI PATTIES". The unchallenged evidence which was before the learned Master, demonstrated that Elite was the occupier of the premises under a lease (which was exhibited) for the purpose of operating its restaurant as a franchise of Juici. Therefore, Elite was the tortfeasor that Ms Kidd intended to join from the beginning.

[54] Finally, the court was asked to consider that rules 19.3 and 19.4 of the CPR place no restriction on the party who may make the application to substitute a defendant; as such, there was nothing improper about the application brought by Juici.

Submissions on behalf of Ms Kidd

[55] There was a similar reliance on the importance of the terms of the franchise agreement in contending that the learned master was correct in her refusal of the application for substitution under rule 19.4 of the CPR. Reliance was similarly placed on **Elita Flickenger v David Preble and Xtabi Resort Limited**.

[56] It was submitted that it was a matter for the court to determine whether the requirements of rule 19.4 of the CPR (special provisions about adding or substituting parties after end of relevant limitation period) and 20.6 (amendments to statement of case after end of relevant limitation period) were satisfied based on Juici's evidence.

[57] Conversely, it was contended that it was not within Juici's power to tell Ms Kidd, who to sue or who she intended to sue, as it could not unequivocally speak to Ms Kidd's intentions. Juici had other legal recourse to advance its assertion that it was not the proper party, this included filing an ancillary claim against Elite.

[58] Reference was made to the acknowledgement of service filed 3 June 2015 by Juici, wherein it admitted that its name was properly stated on the claim form and that it intended to defend the claim.

[59] Finally, it was submitted that it was for claimants (such as Ms Kidd) to tell the court that they made a mistake in naming a party and to apply for a substitution. Reference was made to the case of **Ramon Barton and anor v John McAdam et al** (unreported), Supreme Court, Jamaica, Claim No CL 1996 B 110, judgment delivered 24 May 2005 in support of that submission.

Analysis on ground b

[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.

[61] It is necessary to have regard to the relevant portions of CPR, namely rules 19.2(3), 19.2(5), 19.3(1), 19.3(2), 19.3(3) and 19.4, which provide:

> "**Change of parties - general**
>
> 19.2(3) The court may add a new party to proceedings without an application, if –
>
> > (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings;
> >
> > (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."
>
> "19.2(5) 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."

"**Procedure for adding and substituting parties**

19.3 (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) …

(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.

(4)…"

"**Special provisions about adding or substituting parties after end of relevant limitation period**

19.4(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 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 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."

[62] There is no doubt that it was open to Juici to make an application for substitution. Rule 19.3(2)(a) of the CPR makes this plain. Any pejorative categorisation of this as improper or manipulative cannot be regarded as correct. Accordingly, ground b (ii) has merit.

[63] Turning to ground b (i), in relation to this application for substitution, while it cannot be said to be improper, I cannot conclude that the learned judge was wrong to have exercised her discretion in refusing to grant the order for substitution. The circumstances requiring the application were unusual and may have been the reason why the franchise agreement was deemed relevant by the learned master. While it cannot be ignored, that there was substantial documentary evidence contained in the Chin affidavit, which essentially supported Juici's contention (that Elite was the occupier of the premises at the material time), the decision to substitute Elite as the defendant, at that point in the proceedings, would have effectively removed Juici from the claim altogether It would be comparable to an application to strike out Ms Kidd's statement of case against Juici, or an application for summary judgment in Juici's favour. A decision to substitute at this stage, would, in effect, be a final determination on Juici's late assertion that it was not the occupier, as well as on the authenticity of the documents relied on by Juici. Such an order would not have allowed any opportunity for Ms Kidd to file a reply to the amended defence, or properly assess whether she wished to continue against Juici in the circumstances.

[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.

[65] Juici's acknowledgement of service (wherein it stated that its name was properly stated on the claim form and that it intended to defend the claim) is not determinative of the facts in light of all the above. It would have been premised on the same "significant deficiencies", which Romona Morgan spoke to in reference to the defence. It is quite regrettable that these deficiencies were not discovered earlier by Juici and communicated to Ms Kidd. Were this done, it is likely that this application may have faced no opposition or an application would have been made by Ms Kidd, and the pleadings could have been amended accordingly.

[66] In any event, given the circumstances, it is pellucid that the pleadings as they currently stand, do not place the court in a position to effectively and fairly resolve the matters in dispute between the parties. Bearing in mind the court's power to add a party without an application, pursuant to rule 19.2(3) of the CPR, as set out at paragraph [61] above, an appropriate order would have been, at the very least, for the addition of Elite as a defendant. It is clear that it is both necessary (per rule 19.4(2)(b) of the CPR) and desirable to add Elite as a new party, so that the court can resolve all the matters in dispute in the proceedings (per rules 19.2(3)(a) and (b) of the CPR). The court's power to add a party, can also be exercised after the end of a relevant limitation period, if the court is satisfied that the claim cannot be carried on against an existing party, unless the new party is added (rule 19.4(3)(c)).

[67] Rather than a substitution, of necessity, by virtue of rule 19.4(3)(a) of the CPR on the grounds of a mistake, as Juici contended, it seems that an addition was required having regard to rule 19.2(3)(a) or (b) of the CPR. Therefore, the addition is a prudent course on two bases. It is desirable to add Elite, so that the court can resolve all the matters in dispute in the proceedings, or at the very least, to allow the court to resolve the issue as to the identity of the occupier of the premises. Also, the addition of Elite, after the limitation period, is necessary because Ms Kidd may be disadvantaged if the

claim is carried on against Juici as the sole defendant., in light of the new defence being advanced.

[68] The addition of Elite was, therefore, a course that was open to the learned master to adopt in seeking to achieve the overriding objective to deal with the case justly.

[69] This court is empowered to make this order that the learned master ought to have made on the application before her (see rule 2.15 (b) of the Court of Appeal Rules). For this reason, I would also allow the appeal on ground b, for the appropriate order to be made, adding Elite to the claim as a defendant.

[70] As indicated previously, the facts of this case are somewhat unusual and once there has been compliance with this court's orders in relation to the statements of case, the parties are encouraged to carefully consider, whether subsequent applications are required in furtherance of the overriding objective, prior to the commencement of the trial. This would be in an effort to ensure that the real matters in controversy are placed before the court, having regard to the need for the efficient use of judicial resources and the potential exposure to costs.

Ground c - on the issue of costs-did the learned master err in assessing costs summarily?

Submissions on behalf of Juici

[71] The essence of Juici's contention under this ground is that the learned master erred insofar that the mandatory conditions set out in rules 65.9(1) and (2) were not complied with.

[72] There is a factual dispute relating to the summary assessment of costs.

[73] Juici's position is that the learned master proceeded to summarily assess cost on her own motion, without any application from counsel for Ms Kidd. Further, the learned master invited submissions from counsel for Ms Kidd, but none were made. As such, she proceeded to advise the parties her evaluation of the time that counsel for Ms Kidd ought

to have spent on the matter and awarded costs in the sum of $295,000.00 based on her subjective assessment. Counsel for Ms Kidd merely acquiesced to the learned master's evaluations thereafter.

[74] Counsel for Ms Kidd did not present any brief statement to the learned master pursuant to rule 65.9(2) of the CPR. Rather, the mandatory regime set out in rule 65.9 was wholly abandoned. Counsel referred this court to its previous decision in **Director of State Proceedings et al v The Administrator General of Jamaica (Person entitled to a Grant of Administration in the estate of Tony Richie Richards)** [2015] JMCA Civ 15.

Submissions on behalf of Ms Kidd

[75] It was submitted that the learned master did not err in summarily awarding costs per rule 65.9. It was contended that representations were made in counsel for Ms Kidd's submissions (reference was made to paragraph 13 of the submissions filed 28 February 2020, – which werenot placed before this court) as to the significant costs incurred in objecting to Juici's application.

[76] Further, the learned master assessed costs taking into consideration the basic costs set out in appendix B.

Analysis on ground c

[77] Based on counsel for Juici's submissions, which are not substantially challenged by counsel for Ms Kidd (save for a reference to a paragraph in written submissions which were not placed before this court), it is doubtful whether the learned master exercised her discretion judicially to award costs summarily. No detailed or specific factual assertions of any kind were placed before this court, to contradict the submissions of counsel for Juici, that the learned master proceeded to arbitrarily award costs; and that she did so, without reference to any statement from counsel for Ms Kidd, showing disbursements incurred or the basis on which attorneys' costs were calculated (as required by rule 65.9(2) of the CPR).

[78] The amount of $295,000.00 far exceeds the amounts prescribed for basic costs. For reference, basic costs for the claim, from issue of proceedings to entry of final judgment after trial for one day, is $160,000.00 (per Part 65 – appendix B, sub-paragraph (5) of the CPR).

[79] The words of McDonald-Bishop JA (Ag) (as she then was), in **Director of State Proceedings et al v The Administrator General of Jamaica,** in considering similar circumstances, are particularly apt. She stated at paragraphs [33] to [37]:

> "[33] Furthermore, [rule] 65.9 (1) provides that the learned judge must allow such sum as is fair and reasonable, after taking into account the matters placed before him. Again, what is fair and reasonable requires an objective assessment of the circumstances of the case. The CPR, by providing for the 'basis of quantification' in part 65, have laid down certain criteria by which this objective standard as to what is fair and reasonable may be arrived at.
>
> [34] The learned judge would have been duty bound not only to summarily assess costs but also to take into account the matters enumerated in rule 65.17(3). It was incumbent on the learned judge to have had regards to all these matters and anything else that might have arisen from the circumstances of the case that could have assisted in determining what would have been a fair and reasonable award in the circumstances. **The quantification of costs was, therefore, not simply a matter for the subjective evaluation of the learned judge based on arbitrary considerations. The exercise of his discretion was subject to established rules of procedure.**
>
> [35] The learned authors of Blackstone's Civil Practice 2004 at paragraph 66.5, in speaking of the equivalent English statute, the Supreme Court Act 1981, section 51(1), noted that while the statute has granted to the court a wide discretion in awarding costs and that the court has the full power to determine by whom and to what extent costs should be paid (***Singh v Observer Ltd*** [1989] 2 All ER 751), **'like any discretion, it must be exercised judicially and on reasons connected with the case** (see ***Donald Campbell and Co. Ltd v Pollack*** [1927] AC 732 and the speech of Viscount Cave LC, which continues to represent the law after the introduction of the CPR...)' (Emphasis mine).

> [36] In may be said then, in consideration of the instant case, that although it was within the absolute discretion of the learned judge to award costs in the proceedings before him, he was, nevertheless, required to exercise his discretion judicially and not arbitrarily or capriciously. **In order to act judicially, he was duty bound to have regard to the provisions of the CPR, which prescribe the basis and procedure for the quantification of costs. Therefore, in assessing those costs he should have awarded a sum that was fair and reasonable. This, he would only have been able to do by having regard to rules 65.9** and 65.17(3)(a-h).
>
> [37] When the circumstances in which the learned judge had granted costs in the sum of $100,000.00 are considered within the framework of the applicable rules, it is palpably clear that he did not summarily assess the costs as he was required to do by the rules of court, and by extension, section 28E(1) of the Act which expressly make the exercise of his discretion subject to the rules." (Emphasis added)

[80] Ground c therefore has merit.

Conclusion

[81] For the reasons set out above, I would propose that the appeal be allowed, as the learned master erred in exercising her discretion, by refusing to grant the application for the amendment, failing to make an order to add Elite as a defendant to the claim on the application for substitution, as well as summarily assessing the costs granted to Ms Kidd in the manner that she did. I am not minded to make any order as to costs of the appeal, however, as it is the deficiencies in Juici's pleadings that have brought Ms Kidd here. I would propose, however, that the costs of the applications before the learned master and the consequential amendments in the court below, be borne by Juici to be agreed or taxed.

[82] Subsequent to the preparation of my draft judgment, I have had the privilege of reviewing the consequential orders proposed by McDonald-Bishop JA following her concurrence with my reasoning and conclusion. I agree with the orders she proposed.

BROWN JA (AG)

[83] I, too, have had the privilege of reading, in draft, the judgment of Straw JA and the orders proposed by McDonald-Bishop JA. I agree with the reasoning and conclusion of Straw JA and the orders proposed with nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1) The appeal is allowed.

2) The orders of Master Mott Tulloch-Reid made on 19 January 2021, are set aside.

3) Juici Beef Limited (Trading as Juici Patties) ('the appellant') is granted permission to file and serve an amended defence within 7 days of the date hereof.

4) Elite Restaurants Limited with registered office at 96c Molynes Road Kingston 20 in the parish of Saint Andrew is to be added as a defendant to the claim and named as 2nd defendant on all subsequent statements of case.

5) This order adding Elite Restaurants Limited as 2nd defendant, to be served by counsel for the appellant on all parties to the proceedings within 14 days of the date hereof.

6) Miss Yenneke Kidd ('the respondent') is to file a reply to the appellant's amended defence within 14 days of being served with the amended defence (in accordance with rule 10.9 of the Civil Procedure Rules, 2002); she is also to file an amended claim form and particulars of claim with Elite Restaurants Limited added as 2nd defendant and serve both

documents on the appellant and Elite Restaurants Limited within 28 days of the service of the amended defence.

7) Elite Restaurants Limited is at liberty to file an acknowledgment of service and defence, in accordance with the relevant provisions of the Civil Procedure Rules, 2002.

8) Costs of the application in the court below to the respondent to be agreed or taxed.

9) Costs associated with the respondent's consideration of the amended defence, the receiving of instructions in respect thereof, the preparation, filing and serving of any amendment and/or reply to statements of case, filed pursuant to this order, shall be the respondent's against the appellant, in any event. Such costs are to be agreed or taxed.

10) No order as to costs of the appeal unless the appellant within 14 days of the date hereof files and serves written submissions for a different order to be made. The respondent is permitted to file and serve written submissions in response within 14 days of service of the appellant's submissions.