



[2023] JMSC Civ 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV00152

BETWEEN	DANSWORTH WATSON SHAW	CLAIMANT
AND	PORT AUTHORITY OF JAMAICA	DEFENDANT

Mr. Hadrian Christie, instructed by Georgia Hamilton & Associates for the claimant.

Mr Jeffrey Mordecai for the defendant.

Mr David Johnson instructed by Samuda & Johnson for KCT Services Limited, an interested party.

Heard November 23, 2022 and March 22, 2023

IN CHAMBERS

Whether there was service of a notice of application for court orders – the effect of filing an amended notice of application for court orders – whether an amended notice of application for court orders supersede an earlier notice of application - whether the earlier notice of application should be struck out for lack of compliance with a court order directing service by a specified date.

CORAM: JARRETT, J

Introduction

[1] I have for determination, the preliminary issue whether the claimant's Notice of Application for Court Orders filed on May 24, 2022, was served on KCT Services

Limited on or before June 3, 2022, in compliance with an order of Staple J (Ag) made on May 25, 2022. The primary order sought by the claimant in that Notice of Application was permission to amend his statement of case to change the name of the defendant, to Kingston Container Services Limited. If the Notice of Application was not served, then by virtue of Staple J's order, it stands as struck. Before probing into the issue of service, a summary of the background to the Notice of Application will put the preliminary issue into its proper context.

Background

- [2] On January 17, 2019, the claimant filed suit by way of claim form and particulars of claim against Gateway Shipping International Limited, as the 1st defendant, for damages in negligence and /or breach of the Occupier's Liability Act. He alleged that he sustained personal injuries while working on the ship, "**The Lauca**" while it was docked in the Kingston Container Terminal on July 26, 2013. The 1st defendant was said to be the owners and operators of "**The Lauca**". The claimant joined the Port Authority of Jamaica (PAJ) as 2nd defendant. His pleadings in relation to the PAJ were as follows: -

"The Port Authority of Jamaica (by virtue of the status of the Kingston Container Terminal, an executive agency of the Port Authority of Jamaica located at 8 Ocean Boulevard in the city and parish of Kingston) damages for negligence and /or breach of contract and /or breach of occupier's liability resulting in the claimant sustaining injuries whilst in the course of his employment on July 26, 2013, when was (sic) assigned said duties by the Kingston Container Terminal aboard The Lauca. . ."

- [3] The PAJ filed a defence on March 1, 2019, denying liability. For present purposes the relevant averment in that defence is that at the material time, the claimant was employed to KCT Services Limited, a subsidiary of the PAJ, which had the responsibility for the management and operation of the Kingston Container Terminal.

- [4] The claimant amended the claim form and the particulars of claim three times after being served with the PAJ defence, and despite that defence, in each iteration of the amended pleadings, he continued to aver that the PAJ is sued because the Kingston Container Terminal was its executive agent. The last and extant version of the claim is the Further Amended Claim Form and the Further Amended Particulars of Claim, filed on January 12, 2021.
- [5] Meanwhile, the 1st defendant in its defence filed on March 7, 2019, denied it owned “The *Lauca*” and contended that the owner of the vessel was Norasia Container Lines Limited. The 1st defendant later sought to strike out the claimant’s statement of claim in relation to it. The first amendment to the claim was on April 25, 2019. By that amendment, the claimant pleaded that the 1st defendant was sued as the executive agent for Norasia Container Lines Limited. Then followed a further amendment filed on March 2, 2020, which referred to the 1st defendant as: “Agents for Norasia Container Lines Limited”. By order of Henry McKenzie J on November 19, 2020, the claimant was granted permission to substitute Norasia Container Lines Limited for the 1st defendant. Orders were also made for service of the pleadings on Norasia Container Lines Limited outside the jurisdiction.
- [6] On January 12, 2021, the third amendment to the pleadings was filed, giving effect to the aforesaid order of Henry McKenzie J granting permission to substitute Norasia Container Lines Limited as the 1st defendant. But on an application by that company, Henry McKenzie J’s orders were set aside by Staple J (Ag) on May 25, 2022. One day earlier, on May 24, 2022, the claimant’s Notice of Application (the subject of the preliminary point before me), was filed. Among the orders made by Staple J on May 25, 2022, was the rehearing on July 1, 2022, of the claimant’s application for substitution of Norasia Container Lines Limited as the 1st defendant, as well as the service of the claimant’s May 24, 2022, application on all the parties on or before June 3, 2022, at 3pm. In default of service, the claimant’s May 24, 2022, Notice of Application would stand as struck out.

- [7] On June 2, 2022, the claimant filed an Amended Notice of Application which sought permission not only to amend the name of PAJ to Kingston Container Terminal Services Limited, but also for service on PAJ of the amended pleadings to be deemed service on Kingston Container Terminal Services Limited. Alternatively, the claimant asked that he be given 14 days within which to serve Kingston Container Terminal Services Limited. Before Staple J on July 1, 2022, the claimant withdrew his application in relation to Norasia Container Lines Limited. The learned judge ordered that a Notice of Discontinuance be filed in relation to Norasia Container Lines Limited and that the claimant's Amended Notice of Application filed on June 2, 2022, be heard on November 23, 2022. He however, ordered, that the question whether his earlier order made on May 25, 2022, directing service of the claimant's May 24, 2022, Notice of Application was complied with, was to be determined before the hearing of the claimant's Amended Notice of Application filed on June 2, 2022. On July 6, 2022, the claimant filed a Notice of Discontinuance discontinuing the claim against the 1st defendant: "Gateway Shipping International Limited (as Agents of Norasia Container Lines Limited)", leaving the PAJ as the only defendant to the claim.
- [8] On November 11, 2022, days before his Amended Notice of Application filed on June 2, 2022, was scheduled to be heard by me, the claimant filed a Further Amended Notice of Application seeking, for the first time, to amend the name of the defendant to KCT Services Limited. As I observed earlier, his previous applications all sought to change the name of the defendant to Kingston Container Services Limited. The Further Amended Notice of Application also sought: "Relief from sanctions (if necessary) for the delay in serving this application on KCT Services Limited"; an order that service of the amended pleadings on PAJ be deemed service on KCT Services Limited or, in the alternative, time to serve KCT Services Limited.

The evidence in relation to the preliminary issue

- [9] The Further Amended Notice of Application was supported by a Further Affidavit of Georgia Hamilton and a Supplemental Affidavit of Oswald Hamilton, both filed on November 11, 2022. The PAJ filed an Affidavit of George Riley on November 17, 2022, and Georgia Hamilton filed an affidavit in response to the affidavit of George Riley on November 22, 2022. I will concentrate only on the aspect of the evidence relevant to the preliminary issue.
- [10] Oswald Hamilton depones that he is a process server employed to Georgia Hamilton & Company, the claimant's attorneys-at-law. He sought leave to refer to a previous affidavit sworn by him on June 22, 2022 in which he said that on June 2, 2022, he served a servant and /or agent of Kingston Container Services Limited with the Amended Notice of Application for Court Orders filed on June 2, 2022, along with a supporting affidavit of Sashenna Campbell. He was advised on November 7, 2022, by Miss Georgia Hamilton, attorney-at-law that the said Amended Notice of Application was intended for KCT Services Limited and not Kingston Container Services Limited, as no such entity exists. On November 7, 2022, he returned to the offices at 15-17 Duke Street where he spoke to: "a Mr Glenrick Dennis, one of its servants and/or agents in its Legal DepartmentMr Dennis confirmed that the documents being served on both KCT Services Limited and Port Authority of Jamaica are accepted at 15-17 Duke Street".
- [11] George Riley says he is employed to PAJ as a legal clerk. The essence of his evidence is that the Amended Notice of Application filed on June 2, 2022 was served on PAJ at its registered offices at 15-17 Duke Street, Kingston and that PAJ accepted service and affixed its stamp to the documents, because its name appeared on them as the defendant. He exhibited to his affidavit the documents he said were served on PAJ.

[12] Georgia Hamilton's affidavit filed on November 11, 2022, is not relevant to the preliminary issue, but her affidavit filed on November 22, 2022 in response to that of George Riley is germane. She said that she is the Principal of the Firm Georgia Hamilton & Company and that the note: "Serve KCTSL" on the documents served by Oswald Hamilton and exhibited by George Riley, was written by her as part of her instructions to serve "Kingston Container Services Limited". At the time, she had gotten the acronym mixed up, but she had always intended to serve KCT Services Limited and had provided Oswald Hamilton with the correct registered address.

Submissions

The defendant

[13] I was informed by counsel that the preliminary issue was raised by Mr Mordecai, counsel for PAJ, when the parties appeared before Staple J on July 1, 2022. I therefore invited both Mr Mordecai, and Mr Johnson, counsel for KCT Services Limited, to make submissions on the issue, followed by the response of counsel for the claimant, Mr Christie.

[14] Mr Mordecai argued that the position of the defendant, PAJ, is that its registered office is at 15-17 Duke Street and that the Amended Notice of Application filed on June 2, 2022 was served on PAJ at that address. That application was not served on KCT Services Limited. The entity the claimant was dealing with was Kingston Container Services Limited, and that mirrors a mistake which he has perpetuated. Kingston Container Services Limited does not exist. The PAJ in its defence indicated that the claimant was employed to KCT Services Limited. The documents were served at Duke Street but the name of the entity the claimant was trying to serve was not KCT Services Limited, but KCTSL or Kingston Container Services Limited, which is non-existent. The claimant has never made any attempt to service KCT Services Limited. The claimant has not complied with the order of Staple J and so his application stands as struck.

[15] According to Mr Johnson, the Amended Notice of Application filed on June 2, 2022, was served on PAJ. But the application the claimant sought to pursue, which is for permission to join KCT Services Limited to the claim, was not properly served on KCT Services Limited until November 11, 2022, when the Further Amended Notice of Application was served. This service, counsel argued, was outside the timeline stipulated in Staple J's May 25, 2022, order. The proper application was not served on KCT Services Limited until November 11, 2022, when it was further amended. The previous application served on PAJ could not have been properly served because the order sought was in relation to Kingston Container Services Limited. As Staple J's order was not complied with, the sanction which was imposed by the learned judge crystallised after June 3, 2022. Mr Johnson further argued that the Further Amended Notice of Application filed on November 11, 2022, which seeks relief from sanctions, is not supported by affidavit evidence and that is a requirement to request such relief.

[16] Mr Christie, counsel for the claimant, urged me to consider four propositions. Firstly, that I should interpret Staple's J's order strictly. If I did that, I would recognise that KCT Services Limited was not a party to the claim at the time of the learned judge's order, and so service on them was not contemplated by the order. Secondly, the documents were left at the registered office of KCT Services Limited, and that is proper service on a registered company. Thirdly and in the alternative, the documents would have come to the attention of KCT Services Limited from service on PAJ due to the relationship between the two entities. According to counsel, CPR 5.13 allows for alternative methods of service. Fourthly, I should not give form, precedence over substance when it comes to the error in the name of the entity to be served in the documents. The evidence (the argument went), shows that it is clear that the entity being targeted was KCT Services Limited.

Analysis and discussion

[17] In my view, the answer to the preliminary issue is that the Amended Notice of Application filed on June 2, 2022, was not served on KCT Services Limited. The evidence of George Riley, the PAJ's legal clerk, is clear and, in my mind,

determinative of the issue. He makes it plain, that service of the documents at 15-17 Duke Street on June 2, 2022, was accepted by PAJ as service on them, since it was thought, based on the parties named in the documents, that the documents related to PAJ as the named defendant. PAJ's stamp was therefore placed on the document, evidencing acceptance of service. It is therefore plain to me, that while both PAJ and KCT Services Limited share the same registered address, had service been on KCT Services Limited, then it is KCT Services Limited's stamp or some other indication that service was accepted by that company, which would be affixed to the documents. Although KCT Services Limited is wholly owned by PAJ, and share the same registered address, both are two different legal entities, each having a separate legal personality. There must therefore be service on each of them separately, and the claimant must demonstrate that each of them accepted service. He has only been able to show that PAJ accepted service. The confirmation from Glenrick Dennis, which Oswald Hamilton relies on, cannot assist the claimant. All this confirmation amounts to is an affirmation that the registered office of KCT Services Limited occupies the same address as that for PAJ.

[18] The evidence of Georgia Hamilton and Oswald Hamilton does not show that the intention was to serve PAJ as an alternative means of service on KCT Services Limited. Neither does it show why such an alternative means would have been contemplated, given that the claimant knew the registered address of KCT Services Limited and has not said he had difficulties effecting service on them. I therefore cannot agree, with Mr Christie, that CPR 5.13, which allows for alternative means of service, can avail the claimant.

[19] The procedural background in this matter leaves me with no doubt that Staple J intended service of the May 23, 2022, Notice of Application for Court Orders on the entity the claimant was at that time contending was his employer when he allegedly sustained injuries in September 2013, but had not been named as a party to the claim. That entity was said to be Kingston Container Services Limited, in both the Notice of Application for Court Orders filed on May 23, 2022 and in the Amended Notice of Application for Court Orders filed on June 2, 2022. There is,

however, no such entity. But the submission on behalf of the claimant is that this was an error and that the intention had been to serve KCT Services Limited. If that is so, then notwithstanding the incorrect name in the documents, service ought to have been on KCT Services Limited.

[20] This is not the end of the matter, however, and for the reasons which follow, I believe that the preliminary issue is now academic.

[21] When Staple J made his May 25, 2022, orders, the notice of application which he ordered should be served by June 3, 2022, at 3pm or stand struck out, was filed on May 24, 2022. That Notice of Application for Court Orders was never served on KCT Services Limited. What the claimant did, instead, was to file on June 2, 2022, an Amended Notice of Application for Court Orders.

[22] There is nothing in the CPR treating with amendments to Notices of Application for Court Orders. These notices, which are filed pursuant to CPR 11, are not pleadings. It means therefore that the provisions of CPR 20 dealing with amendments to statements of case do not apply to them. CPR 26.1(2) (v) provides that the court may take any step, give any other direction or make any other order for managing cases and furthering the overriding objective. While it is my opinion that this rule is wide enough to give the court the power to grant applications to amend notices of application which have been filed but not yet heard, in our jurisdiction such applications are rarely if ever made. This is because typically, notices of applications once amended have been treated as standalone applications which supersede the prior original application. The position is analogous, in my view, to the effect of amended pleadings.

[23] In commenting on the nature of amended pleadings, Hodson LJ in **Warner v Sampson [1958] QB 297, at 321** said that: -

“Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defined the issues to be tried”.

This dictum was adopted and accepted by our court of appeal in **B&J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2**. There may of course be cases where a litigant may wish to amend a notice of application, but needs the amended notice of application to have the same effective date as the date of the original application. In such a case, it is my view that the court's permission would be required. No such request for permission has been sought in this case. I therefore take the view that the Notice of Application filed on May 24, 2022, was superseded by the Amended Notice of Application filed on June 2, 2022, and that that Amended Notice of Application was itself superseded by the Further Amended Notice of Application filed on November 11, 2022. It means therefore that on June 2, 2022, upon the filing of the Amended Notice of Application; the May 24, 2022, Notice of Application was no longer before the court. The order of Staple J in relation to it could therefore not have crystallised on June 2, 2022, at 3pm. Put another way, it could not have been struck out because it was no longer before the court.

[24] The effect, then, is this. On the filing of the Further Amended Notice of Application on November 11, 2022, the question whether the Notice of Application filed on May 24, 2022, or the Amended Notice of Application filed on June 2, 2022, were served on PAJ or on KCT Services Limited by June 2, 2022, at 3pm is academic and otiose. With the June 2, 2022, Amended Notice of Application being superseded by the November 11, 2022, Further Amended Notice of Application, the only extant application before the court is the latter. Staple J's order of May 25, 2022, has no bearing on it. According to Mr Johnson, KCT Services Limited was served with the Further Amended Notice of Application on November 11, 2022. It is that application that the court must now determine.

Conclusion

[25] In the result, I make the following orders:

- a) The Notice of Application for Court Orders filed on May 24, 2022, was not served on KCT Services Limited, but that application has been superseded by the Amended Notice of Application filed on June 2, 2022,

this latter application itself being superseded by the Further Amended Notice of Application filed on November 11, 2022.

- b) The Further Amended Notice of Application filed on November 11, 2022, is unaffected by the May 25, 2022 Order of Staple J (Ag) and is an existing application before the court for determination. The hearing of this application is scheduled for April 17, 2023 at 11.00am for 2 hours.

- c) No order as to costs.

Althea Jarrett
Puisne Judge