[2014] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 117/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**GRACE TURNER**	**APPELLANT**
A N D	**UNIVERSITY OF TECHNOLOGY**	**RESPONDENT**

Owen Crosbie and Mrs Eileen Crosbie-Salmon instructed by Owen Crosbie & Co for the appellant

Gavin Goffe and Jermaine Case instructed by Myers, Fletcher & Gordon for the respondent

25 November, 19 December 2013 and 13 June 2014

HARRIS JA

[1] In this appeal, the appellant challenges an order of Glen Brown J, in which he refused an application by her to strike out a case brought by the respondent against the appellant and Ms Andrea Williamson. On 19 December 2013, we dismissed the appeal and awarded costs to the respondent.

[2] The appellant was an employee of the respondent and on 22 July 2001, during the course of her employment, she executed a bond, in which the respondent, at her request, agreed to make available the sum of $1,213,725.00 or "such other increased sum" to enable her to pursue a course at the University of the West Indies for one year and six months. Ms Williamson acted as surety for the appellant's performance of the bond. The respondent disbursed the sum mentioned above over the course of 18 months.

[3] The bond provided, among other things, that the appellant would resume her employment for a period of not less than two years and six months upon completion of the course of studies; the respondent would not be compelled to re-employ the appellant upon completing the course, but if she were to be re-employed, her services would offset the sum granted under the bond; failure of the appellant to resume employment within the time prescribed under the bond would require her to repay the sum disbursed with interest at the rate of interest of 25% per annum from the date, or dates of disbursement.

[4] The appellant, on 1 March 2003, resumed duties and after one year and six months, resigned on 30 November 2004. A sum remained outstanding on which the respondent granted a rebate, requiring the appellant to pay the sum of $606,862.50. This sum, having not been paid, the respondent brought proceedings against her and Ms Williamson on 23 November 2010, for its recovery, by way of a claim form in which it described itself as "The University of Technology".

[5] On 14 April 2011, the respondent filed an application to amend the claim form to adjust the name of the claimant therein to read "The University of Technology, Jamaica". This was followed by an application, filed on 4 July 2011, by the appellant to dismiss the application to amend the claim form. It appears that both applications were heard by Master George (as she then was) on 27 July 2011. She dismissed the respondent's application to amend, "as the limitation period has not yet expired".

[6] In the wake of that order, the respondent, on 12 October 2011, filed an amended claim form, in which it adjusted the name of the claimant to read "The University of Technology Jamaica". On 24 October 2011, the appellant brought a further application seeking the following orders:

> "(1) That the bringing of the action and the amendment are abuses of the process of the court.
>
> (2) That the action be dismissed.
>
> (3) Costs to the Defendant/Applicant to be taxed if not agreed."

[7] This application was supported by an affidavit of the appellant of which paragraphs 4 to 7 (a) and (b) read as follows:

> "...
>
> 4. That the first named Defendant on July 4, 2011 filed Notice of Application for Court Orders to dismiss the Claimant/Applicant's Application for Permission to Amend Claim Form and for disobedience of the Order of Master George, as she then was, for the Claimant/Applicants to file and serve legal submissions on or before 24th June, 2011. This was pursuant to a hearing on 1st June, 2011 before the said Master George as she then was.

5. That on the 27th day of July, 2011 both Applications were before Master George, as she then was, Mr. Robert Collie, Attorney appearing for the Claimant/Applicant confessed to the Court that the limitation period would not have expired in relation to a Bond on which the Claimant was relying, whereof the Court made the following orders:-

    1. The Claimant's application to amend is dismissed as the limitation period has not yet expired.

    2. Cost to the 1st Defendant to be agreed or taxed.

    3. The Claimant's Attorney-at-Law is to prepare, file and serve this Order.

6. That my said Attorneys informed me and I do verily believe that they were served by fax with Formal Order filed October 11, 2011, Amended Claim Form and Amended Particulars of Claimfiled October 12, 2011 in the said Claim No. 2010 HCV 05831.

7. That the amendment is an abuse of the process of the court for the following reasons, inter alia:

    (a) The Claimant is not a legal person and is incompetent to bring the action and so the amendment which seeks to create a legal person is too late - a company must sue and be sued in its full registered name. (Atkin's Court Forms, 2nd edn, 1995 issue, Vol. p 13) (Commonwealth Caribbean Civil Procedure, 2nd Edition, pg 27); *[Pleading. Public companies and other corporations aggregate, whether incorporated by charter, by prescription, by Act of Parliament, or by statutory registration, sue and are sued by their corporate name. This must be set out in full on the writ and in the heading of every pleading].* (Bullen and Leake and Jacob's Precedents of Pleadings, twelfth edition, pg. 330).

    A claim will be made by or against a person 22.3(1) CPR; Section 3(1) of The University of Technology, Jamaica Act provides:

    > *"There is hereby constituted a University to be known as the "University of Technology, Jamaica".*

3(2) The University shall be a body corporate to which section 28 of the Interpretation Act shall apply.

Section 28(1)(a)(i)of the Interpretation Act.

To vest in that body when established the power to sue in its corporate name.

(b) Amendment is res judicata, application to amend was already refused and if not res judicata, the Claimant would have lost its opportunity to seek other grounds for amendment at one and the same time and by not seeking any other ground for amendment arbitrarily and in bad faith amended; the Claim Form and Particulars of Claim knowing at the time of amendment that a corporation must sue and be sued in its full name statutory or registered and not a part thereof. In this context, the Claimant made an application to the court for permission to be granted to amend the Claim Form herein to correct the name of the Claimant to read the "UNIVERSITY OF TECHNOLOGY, JAMAICA". The application was refused (by Master George, as she then was on 27th July, 2011 with costs to the first Defendant to be agreed or taxed) as stated."

[8] The appellant also stated in her affidavit, that the bond, having not been sealed, is not a Deed, and her resignation was accepted without reference to a bond. She also averred that the bond was not executed by someone within authority of the University of Technology nor was it executed in the presence of a justice of the peace. It was further stated by her that even if a bond was in existence, it would have been implicitly aborted by the respondent's conduct in re-employing her prior to the end of the course, as well as the expiration of the time between her resignation and 3 August 2006, being the date of the letter of demand sent to her by the respondent's attorneys-at-law.

Submissions

[9] Mr Crosbie contended that the learned judge failed to conduct a hearing and dismissed the appellant's application by merely making reference to the case ***Auburn Court Limited v Jamaica Citizens Bank Limited*** SCCA No 69/2009, delivered on 20 December 1990. The dismissal of the application without hearing from the parties, he argued, amounted to a mistrial. The learned judge having arrived at his decision without a hearing was in breach of natural justice, he submitted.

[10] It was also counsel's submission that the suit was not instituted in the respondent's corporate name and the party who was named therein as the claimant was not a legal person. Legally, proceedings may only be commenced by a legal person and in the case of a misnomer, a name cannot be amended after the limitation period has expired, he contended. Counsel made reference to the case of ***Caribbean Development Consultants v Gibson*** Suit No CL 323/1996, delivered on 25 May 2004, cited by the respondent and submitted that that case is of no assistance to the respondent as it demonstrates that one cannot amend to create a legal person and the judge, in that case, relied on ***Lazard Bros & Co v Midland Bank Ltd*** [1932] All ER Rep 571, a case from the House of Lords, which shows that the naming of a person who is without the capacity to sue or be sued is a nullity. In his written submissions counsel also stated that:

> "The judgment in ***Auburn Court Limited v Jamaica Citizens Bank Limited*** was under the repealed RSC, and notwithstanding unlike this case, an unconditional Appearance to the Writ was entered and no effort was made to withdraw that Appearance; and in the light of the HOUSE OF LORDS decision in particular, any

> decision in Auburn Court to the contrary, if any, is wrong and not to be followed."

[11] He further argued that the bond, is not under seal and it, having not been properly executed, does not satisfy section 9 of the Probate of Deeds Act.

[12] Mr Goffe, for the respondent, argued that this appeal relates to the refusal of the learned judge to dismiss the case brought by the respondent as being an abuse of the process of the court, but the application by the respondent to amend the claim was dismissed for the reason that an amendment to the claim form was unnecessary and that decision has not been appealed. The issue in this appeal, he argued, is whether the learned judge had abused or incorrectly exercised his discretion in making his order.

[13] The hearing of the application was conducted by written submissions which were before the learned judge and the complaint by the appellant does not support the contention that the appellant did not obtain a hearing, as rule 26 of the Civil Procedure Rules (CPR) makes provision to support the fact that a hearing may be conducted by written submissions, he submitted.

[14] On the issue as to the limitation period, he argued, the amendment was done in accordance with the CPR. The application to the learned Master for the amendment was unnecessary as the limitation period had not expired, although it was the respondent's belief that the limitation period had in fact expired, he submitted. In any event, the matter of the amendment in respect of limitation period was not a

ground which would require the claim to be struck out as an abuse of process, he contended.

[15] In dealing with the appellant's submission that the respondent is not a party in law, Mr Goffe submitted that where there is a misdescription of a party caused by a genuine error and the opposite party is aware of this, an amendment may be made to correct the error. Even if the party named therein is not a legal person, the party who was incorrectly described may re-commence the proceedings and may do so even if the limitation period had expired, he argued. The appellant has not asserted that she was unaware of the party which brought the suit and further, there is no dispute that the parties were employer and employee, he contended. Although, there is an error in the respondent's name, he submitted, there can be no reasonable doubt as to its identity and the respondent had the right to amend without the court's permission.

[16] Counsel cited the case of ***International Bulk Shipping & Services Limited v Minerals and Metals Trading Corporation of India*** [1996] 1 All ER 1017 to reinforce the principle that the court is empowered to amend the name of a party where a genuine error occurs but an amendment to a writ (claim form) will not be made where there is an error as to the identity of the person intending to sue if the amendment was aimed at rectifying an error as to the name of that party. The respondent, counsel submitted, was a legal entity and was adequately described to make its identification clear, despite the misstatement of its name. Counsel also cited ***Caribbean Development Consultants v Gibson*** which he distinguished from the

present case, as, in that case the claimant was not a legal entity and did not have the capacity to sue, while in the instant case the respondent was merely referred to by a wrong name.

[17] In respect of the bond not being in compliance with the Probate of Deeds Act, Mr Goffe submitted that that point was never taken before the learned judge.

Analysis

[18] The issues arising are:

(1) Whether the appellant was afforded a hearing.

(2) Whether the amendment to the claim form was outside of the limitation period and an abuse of the process of the court.

(3) Whether the bond was ineffective.

(4) Whether the amendment of the name of the respondent is an abuse of the process of the court.

[19] We will first give consideration to the appellant's complaint that the learned judge failed to give any consideration to her application, as she was not given the opportunity to make oral submissions, in that, the learned judge dismissed the application without hearing the parties. It is not a mandatory requirement that, before arriving at a decision, oral evidence should be taken by a judge. In some instances, the rules of court make provision for a hearing to be considered on paper. Rule 26.1(2)(p) of the CPR permits such a procedure. It reads:

> "Except where these Rules provide otherwise, the court may -
>
> …

(p) instead of holding an oral hearing, deal with a matter on written representations submitted by the parties."

[20] The pre-reading of documents, including submissions by counsel and authorities in support thereof, out of court by judges, has become a common practice. A right is conferred on a judge to choose whether the taking of evidence and the consideration of submissions should be done orally or whether, in the interest of economy and efficiency can be done on paper. The process of conducting a hearing on written representations being incontestably provided for by the rule, it is clearly permissible for a case to be heard without the presentation of oral submissions by the parties.

[21] Mr Crosbie's submission that the learned judge, without considering oral representations from the parties, merely relied on the case of ***Auburn Court Limited v Jamaica Citizens Bank Limited***, is devoid of merit. Even if the learned judge had relied on that case, he would not have done so without first being satisfied that there was sufficient material on which he could have made a determination. There were, before him, the appellant's application, her affidavits, written submissions from both parties, and the authorities on which the parties relied and there is no doubt that the appellant would have been aware of this. ***Auburn Court Limited v Jamaica Citizens Bank*** related to the failure of the claimant to amend a writ of summons and subsequent proceedings, despite an order of the Master that the writ be amended by deleting the name "Auburn Court" and substituting "Auburn Court Limited". In the present case, before arriving at his decision, it is reasonable to infer that the learned

judge would have undoubtedly read the material which was before him. The appellant's complaint of having not received a hearing is unsustainable.

[22] The argument by Mr Crosbie that ***Caribbean Development Consultants v Gibson*** was unhelpful to the respondent is misplaced. That case was not cited by the respondent in support of its submissions. Reference was made to the case, in contrast to the present case, to show that the claimant in that case was not a legal entity and was devoid of the capacity to bring the action, while, in the instant case, the respondent has the capacity to commence the proceedings but had mistakenly done so by simply using the wrong name. Contrary to Mr Crosbie's submission, although the judge, in ***Caribbean Development Consultants v Gibson*** relied on the case of ***Lazard Bros & Co v Midland Bank***, in making his determination, the necessity would not have arisen for that case to have been taken into consideration in the making of a decision in ***Auburn Court Limited v Jamaica Citizen's Bank***.

[23] The next issue to be examined is the amendment to the claim form. The action is founded in simple contract. In an action relating to a simple contract, the Limitation of Actions Act provides for a period of limitation of six years from the date of the accrual of the cause of action. The cause of action arose on 30 November 2004, the date of the appellant's resignation. The claim form was filed on 23 November 2010, just before the expiration of the limitation period. On 12 October 2011, approximately 11 months later, when the amended claim form was filed, the period of limitation would, therefore, have already expired.

[24] Guidance as to what amendments may be made to statements of case, and when they may be done, is to be found in the CPR. Rule 20.1 of the CPR grants to a party the right to amend a statement of case, without the court's permission, at any time before the case management conference, unless certain conditions outlined in rules 19.4 or 20.6 apply. In this case, the case management conference had not yet been held, but both rules 19.4 and 20.6 restrict amendments after the expiry of the relevant limitation period. Rule 19.4 speaks to adding or substituting parties while rule 20.6 speaks to amending statements of case, including correcting the name of a party.

[25] In making the application that went before Master George, the respondent had sought to avail itself of the provisions of rule 20.6.

[26] Although six years had already elapsed between the resignation and the date of the hearing before Master George, the learned Master ruled that the limitation period had "not yet expired". What, therefore, was the respondent to have done in those circumstances? It took the view that it could benefit from rule 20.1 and it filed the required amendment. Whether it was a permissible amendment is the subject of the issue to be discussed next.

[25] We now turn to the issue relating to the amendment of the name of the respondent. Where an action is brought by or against a party in an incorrect name, leave will be granted to correct the wrong name and substitute the correct name. Rule 20.6 of the CPR, as mentioned above, makes provision for the amendment of the name of a party, provided certain conditions are satisfied. The rule reads:

"20.6 (1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.

(2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –

(a) genuine; and

(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."

In keeping with the prescriptions of this rule, it must be shown that a *bona fide* error had been made in the name of a party and the mistake which is sought to be corrected was not misleading or such as to create reasonable doubt as to the identity of the party. In deciding on an amendment where a party has been wrongly named, authoritative guidance from the case of ***Sardinia Sulcis v Al Tawwab*** [1991] 1 Lloyd's Rep 201, enunciates the test to be whether the intending plaintiff or defendant can "be identified by reference to a description which is specific to the particular case. If the answer is yes, then an amendment can be allowed..."

[26] The issue, in this case, is not whether the correction relates to a mere misnomer but whether the error is genuine and the correction would not raise any reasonable doubt as to the identity of the party. Is there evidence, in this case, to show a genuine mistake as to the name of the respondent and that there is no doubt as to its identification? In an affidavit, sworn by Shauna Kaye-Hanson on 13 April 2011, in which she speaks to the error in naming the respondent, she said at paragraph 5:

> "After the filing of the Court documents, it came to the firm's attention that there was an error in the name of the Claimant in the version of the Court documents which were filed. The Claimant, which is a legal entity, was misdescribed in the Court documents. In particular, the Court documents described the Claimant as the *University of Technology* instead of the *"University of Technology, Jamaica*". The mistake in the name of the Claimant was a genuine one."

[27] The amendment made by the respondent relates to the correction of a misnomer. The claim contained a reference to the identity of an actual entity, that entity being the respondent, but the full name of the entity was not set out. The correction did not go beyond the realm of fixing a simple misdescription of the respondent and did not seek to adjust its identity. It is clear that the error in not including the word "Jamaica" as part of the respondent's name was an innocent omission, or a mere accidental slip.

[28] Further, the respondent is a legal entity and can be positively identified by a specific description. It was Mr Crosbie's submission that only a legal entity may institute proceedings and that an amendment cannot be made to a claim to substitute a legal entity where none was named before. That submission is, in this context, flawed. As rightly submitted by Mr Goffe, there were circumstances which would not have given rise to any reasonable doubt that the respondent had been initially correctly identified. In his written submissions he listed, among others, the following reasons to show that there can be no doubt that there was no mistake as to the identity of the respondent:

> "The Claimant is unarguably a legal person, as it was established by the University of Technology, Jamaica Act. Section 3 (2) of the University of Technology, Jamaica Act states that the University

> shall be a body corporate to which section 28 of the Interpretation Act shall apply.
>
> Section 28 of the Interpretation Act sets out the powers of a body corporate and they include, among other things, the powers of a body corporate, and they include, among other things, the power (of the body corporate) to sue in its corporate name.
>
> The Appellant was fully aware of [sic] that the Respondent had the necessary legal capacity to sue the 1st Defendant for outstanding monies owed. The Respondent was and is still deemed to be a legal person and as such is competent to bring this action."

We are in full agreement with these submissions.

[29] There is clearly no mistake as to the identity of the respondent. There was no other entity referable to the amended name of the respondent, and the appellant, being an employee of the respondent, would have been fully cognizant of this. There is little doubt that the respondent was the party which intended to bring the action in its name. No prejudice would have been occasioned by the amendment. The respondent had a right to bring the claim. In all the circumstances of the case it cannot be said that either the claim or the amendment to the claim form was an abuse to the court's process. The court was, therefore, entitled under rule 20.6, to allow the amendment to stand.

[30] We now turn to the question of the bond. Section 9 of the Probate of Deeds Act states:

> "All deeds executed in this Island shall be proved on the oath or affirmation of the subscribing witness or witnesses, or acknowledge by the party or parties before the Governor-General, or any of the

> Judges of the Court of Appeal or of the Supreme Court, or any Justice of this Island; and such probate shall bear the true temporal date thereof."

[31] The issue advanced by the appellant as to the bond raises a point of law which can be entertained by this court even if it had not been raised in the court below. A photocopy of the bond was exhibited. It shows that it was executed by the appellant, the guarantor, Ms Williamson, and two witnesses. That document is incomplete as to whether the execution was sworn or acknowledged before any of those persons prescribed by the Act. That defect, if it be one, is not fatal to the claim. The respondent avers in its statement of case that it provided consideration for the promises made by the appellant and Ms Williamson, in that it paid the sum agreed over the course of 18 months. It is entitled to file a claim in that regard and the present claim does not preclude such an approach.

[32] There is absolutely no merit in the appeal. We cannot say the learned judge was wrong in refusing the application.

Postscript

[33] When our decision was handed down on 19 December 2013 it was, out of sheer convenience, delivered by a panel that was available to do so on that date. It has come to our attention that, subsequent to the delivery of our decision, counsel for the appellant expressed concern about the delivery of the judgment by a differently constituted panel. From time to time due to the unavailability of all or some of the

members of the panel of judges that heard submissions in a particular matter, an available panel is constituted for the sole purpose of delivering the decision arrived at by the original panel. We wish to make it abundantly clear that our decision, which is as indicated in paragraph [1] hereof, was arrived at through the deliberations of only the judges of appeal who sat and heard the submissions of counsel for both parties. It's delivery by a differently constituted panel in no way affects its validity.