BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 883 of 2009

BETWEEN:

CORINE WIGGINS CLAIMANT

AND

ABEDS ENTERPRISES LIMITED DEFENDANT

Before the Honourable Mr. Justice Randall Worrell, Judge of the High Court

Date: 2012: October 2
2015: June 12

Appearances:

Mrs. M Woodstock Riley, Q.C. Attorney-at-Law for the Respondent

Mrs. C.P. Chase, Q.C. Attorney-at-Law for the Claimant

DECISION

Introduction

[1] The Claimant is a retired cook. The Defendant is a company registered under the Companies Act Cap 308 and operates a clothing and textile business in Bridgetown.

[2] On or about 13 November 2008 the Claimant entered the Defendant's premises where she sustained personal injuries as a result of falling backwards from an escalator.

[3] On 18 May 2009 the Claimant filed a writ of summons and statement of claim against the Defendant alleging that it had breached its statutory duty under sections 4 and 5 of the Occupiers Liability Act Cap 208 and or by the negligence of the Defendant, its servants or agents or both.

[4] In its Defence filed 1 July 2009, the Defendant denied that it or its servants were guilty of any negligence or breach of statutory duty and averred that its system of inspection, maintenance and repair was sufficient to discharge its duty of care. The Defendant alleged that the Claimant created her own misfortune and that her injuries were wholly caused by her own negligence. The Defendant denied that the escalator was faulty and relied on the fact that its escalator had been serviced mere days before the Claimant's fall. Further, at paragraphs 7 and 8, the Defendant contended that it had acted reasonably in entrusting the maintenance and servicing of the escalator to the independent contractors (see: maintenance servicing contract signed 14 May 2002); and it also contended that the independent contractors' were wholly responsible.

Application

[5] The issue of liability was scheduled for hearing on 2nd and 3rd October 2012. However, on 1 October 2012 the Claimant filed a notice of application supported by affidavit seeking an order under **Part 19** of the **CPR** to add Electric Sales and Service Ltd (ESSCO) (the independent contractors responsible for servicing the escalator) as a party to these proceedings. In the affidavit in support, the Claimant deposed that she believes that ESSCO was hired by the Defendant and ought to be added as a party thereto in order to resolve the issue of liability.

[6] The Claimant's proposed amended statement of case seeks to add ESSCO as a party to the proceedings in an effort to establish liability for the Claimant's injuries and sets out the particulars of negligence.

[7] The Defendant resists the Claimant's application to add ESSCO as second defendant for the reasons which follow. First, it was argued that there was delay in making the application. Reliance was placed on rule 19.2(6) which states that an application to add a party must be made as soon as practicable at a case management conference (CMC). According to the Defendant, the Claimant had been advised since 2009 that the escalator was serviced and maintained by the independent contractor: (see: correspondence from the Defendant dated 2 July 2009, the Defendant's Defence as well as the

Defendant's witness statements.) Further, the Claimant failed to make an application to add ESSCO as a party notwithstanding a CMC was held on 19 April 2010 and Pre-trial Review (PTR) was conducted in 2011.

[8] Second, counsel submitted that to add ESSCO at this stage of the proceedings would contradict the overriding objective (**rule 1.1**). In particular, it was pointed out that the Claimant's application was made one day before trial, notwithstanding that a CMC and PTR had taken place, and in all the circumstances has resulted in the matter not being dealt with expeditiously and fairly. Additionally, the parties continue to incur costs. Particularly the Claimant a retiree may be unable to satisfy costs in the matter.

Issue:

[9] The issue which arise is as follows:

i Whether the Court should allow ESSCO to be added as a defendant at this stage of the proceedings.

Law

Part 1 - The Overriding Objective

[10] **Rule 1.1 (1)** provides that the overriding objective of these Rules is to enable the court to deal with cases justly. Dealing with cases includes so far as is practicable:

(a) ensuring that the parties are on equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to

(i) the money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[11] **Rule 1.2** states that the court must seek to give effect to the overriding objective when interpreting these Rules or exercising any powers under these Rules. Moreover, **rule 1.3** places a duty on the parties to help the court to further the overriding objective.

Part 19 – Addition of parties

[12] Part 19 deals with the addition of parties after proceedings have been commenced. In the text **Commonwealth Caribbean Civil Procedure, 3rd ed.,** the authors state at **p. 41** that:

> "**The broad policy of the law is that where there are multiple claims there should be as few actions and as few parties as possible; the ends of justice will be better served and the court's resources more efficiently utilised if all the parties to a dispute are before the court so that its decision will bind all of them.**
>
> …
>
> Preferably, of course, a claimant should at the outset, when he prepares his claim form, decide which persons to join as defendants, as there are no restrictions in the CPR on the

> number of claimants or defendants who can be joined as parties; there will, however, be occasions where the need to join an additional party only surfaces after the proceedings have commenced, in which case the provisions of the CPR allowing joinder of parties can be relied upon." (**emphasis mine)**

[13] Rule 19.2 (1) states that a claimant may add a new defendant to proceedings without permission at any time before the first case management conference. However, **rule 19.2(6)** provides that, "an application to add a party is to be made as soon as practicable at case management conference unless the court directs otherwise".

[14] The applicable test for adding a party is found at rule 19.2 (3) of the CPR. **Rule 19.2(3)** provides that the court may add a new party to proceedings without an application having been made to do so, where

> (a) It is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (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.

[15] This was affirmed in the Court of Appeal decision of ***Financial Services Commission and BIPA Inc. v British American Insurance Company (Barbados) Limited*** **Civil Appeal No. 4 of 2012 (decision of 31 October 2012)** and followed in ***Auto-Guadeloupe Investissement S.A. v Alvarez, Lee, and The Attorney General*** **CV 199 of 2013 (decision of 4 April 2013)**.

[16] By virtue of rule 19.3(1), the Court is empowered to add a party on or without an application. The application for permission to add a party may be made by an existing party (**rule 19.3 (2) (b)**). The application for an order for the addition of a party must be made with notice and must be supported by evidence on affidavit: **rule 19.3 (3)**.

Part 20 – Changes to a statement of case

[17] Part 20 relates to changes to a statement of case. It provides that:

> "**20.1** (1) A statement of case may be amended at any time prior to a case management conference and the filing of a defence without the court's permission.
>
> **(2) The court may give permission to amend a statement of case at a case management conference or, at any time after a case management conference, upon an application being made to the court.**
>
> **(3) A statement of case may not be amended without permission under this rule if the amendment involves a change of parties which could not be made without permission under Part 19 or if rule 20.2.**" (emphasis mine)

Addition of ESSCO as a party to the proceedings

[18] It is the Defendant's contention that the Claimant would have ascertained that ESSCO, the proposed party, was responsible for servicing and maintaining the Defendant's escalator, however, the Claimant did not add ESSCO before or at the CMC in 2010. Indeed the record reveals that a

significant length of time elapsed between when the Claimant was advised of ESSCO's involvement in the matter (July 2009) and when this application to add it as a defendant was filed (October 2012).

[19] In her affidavit in support, the Claimant deposed to the following:

> "8. ***A Defence was filed on the 1st day of July 2009, by the Defendant claiming that it was not liable for the accident and in the alternative, the company Electric Sales and Service Ltd (ESSCO) was wholly liable as an independent contractor pursuant to a contract to maintain and service the said escalator. The Defendant did not join the company Electric Sales and Services as I had hoped and anticipated.*** I am a retired person and my resources to pursue my legal rights are indeed limited.
>
> 9. I have been advised by my Attorney-at Law and do verily believe that the company Electric Sales and Service Ltd (ESSCO) which was hired by the Defendant to maintain the escalator is connected to the matter in these proceedings and ought to be added as a party thereto in order to resolve the important issue of liability in this matter.
>
> 10. I am forced now to apply to the Court for an order to have the said Electric Sales and Service Ltd (ESSCO) added as a party to this action, so that the court can resolve the matters in dispute more effectively and I am convinced that it is desirable to add the new party Electric Sales and Service Limited (ESSCO) so that the court can resolve the issue of liability." (***emphasis mine***)

[20] The Claimant's reason for the 3 year delay in bringing the application is totally unsatisfactory. The evidence before the Court reveals that Counsel for the Claimant had been advised of the existence of the service contract before the claim was instituted. Her anticipation or expectation of the Defendant to add ESSCO as a party to the proceedings is troubling and lamentable since the burden of proof in civil cases rests with the claimant.

[21] In sum, Counsel for the Defendant submitted that the Claimant's application should be denied where there has been no change in circumstances becoming known after the CMC. However, this is a consideration not present in the Barbados CPR which must be distinguished from the T&T CPR because rule 19.2 (7) of the T&T CPR states that the court's powers are not to be exercised after a CMC unless the applicant can satisfy the court that the addition is necessary because of some change in circumstances which became known after the CMC. There is no such equivalent rule in the Barbados CPR. In **Commonwealth Caribbean Civil Procedure (supra)**, the authors state:

> "It is further provided that the court may, on its own initiative, add, remove or substitute a party at the case management conference, but no party may be added *after* the conference (except by substitution) unless the court is satisfied that the addition is necessary because of some change in circumstances becoming known after the case management conference."

[22] Rule 19.2 (7) was applied in the case of ***Ragbir v Hornbeck Offshore Company Limited*** **CV 1432 of 2007 (decision of 14 November 2008)**. There, the claimant, an employee of the defendant company, suffered personal injuries during the course of his employment. The question arose as to who was responsible for the claimant's injuries in circumstances where another company had divested its interests in the platform to the proposed

defendant (Repsol). The parties met in CMC on 26 October 2007. On 5 June 2008, the Claimant filed an application to join Repsol as a defendant. In his affidavit in support, the claimant stated that he would not have ascertained facts prior to the filing of the first CMC.

[23] Relying on rule 19.2 (7), counsel for Repsol opposed the application arguing that the information concerning Repsol was known to the Claimant and his attorneys and that they had failed to act on it. There was therefore no change in circumstances after the CMC. The court held that there was no change in circumstances as contemplated by the Rules and dismissed the claimant's application.

[24] Again, it must be pointed out that there is no equivalent rule 19.2 (7) or requirement in the Barbados CPR for a party to show that there was a change in circumstances after the CMC and therefore the Court's discretion to add a new party to the proceedings is not fettered or subject to such a provision.

The Relevant Tests

[25] Rule 19.2 (3) confers a discretion upon the Court to add a new party to proceedings if it is necessary to facilitate the resolution of all matters in dispute in the case. The relevant tests to be applied are whether:

(i) it is desirable to add ESSCO so that the Court can resolve all the matters in dispute in the proceedings or;

(ii) there is an issue involving ESSCO which is connected to the matters in dispute in the proceedings and its is desirable to add ESSCO so that the Court can resolve that issue.

[26] Having regard to the foregoing, the matter in dispute is centered on liability for the Claimant's injuries.

[27] In its Defence the Defendant denied liability for the Claimant's injuries and alleged, in the alternative, that ESSCO is wholly responsible. Further, the Defendant had a service contract with ESSCO to ensure the proper safety condition, maintenance and servicing of the Defendant's escalator. The maintenance and servicing of the Defendant's escalator is an issue connected to the matter of liability being disputed. Therefore, it is desirable to add all relevant parties so that the Court can resolve the issue of liability.

[28] Further, the Claimant's proposed amended statement of case shows that there is an issue (of liability) involving ESSCO which is connected to the matters in dispute. The proposed amended statement of claim indicates that the issues to be resolved stem from the service contract entered into between the Defendant and ESSCO. In the text ***Commonwealth Caribbean Tort Law 3rd ed*** at ***pp.129-130***, Kodilinye summarizes the law on liability of

occupiers' and independent contractors under the **Occupiers Liability Act (OLA) Cap 208** as follows:

> "Where the injury to the visitor is caused by the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the latter will not be liable if:
>
> (a) he acted reasonably in entrusting the work to the contractor; and
>
> (b) he took reasonable steps to satisfy himself that the contractor was competent and that the work had been properly done: s 4(6) of the OLA (Barbados)."

[29] It is my observation that the failure of the Claimant's counsel either to add ESSCO as a party or to advise her client to add ESSCO as a party in this action at an earlier stage, in circumstances where she was informed/advised of the existence of a service contract between the Defendant and ESSCO for the escalator, cannot be overlooked in all the circumstances. The Court should take note of the careless and perfunctory manner in which the matter was handled.

[30] Moreover, it must be observed that the Claimant's application filed at the 11th hour has been counter to the overriding objective. That is to say, the late filing of the Claimant's application effectively jeopardized and inevitably postponed the hearing dates; further, the matter has not been dealt with expeditiously having regard to the now 3 year lapse since it was filed; no

expenses have been saved; the Court has exceeded an appropriate share of its resources on this matter; the issues are not of a complex nature; and the financial positions of the parties are starkly contrasted the Claimant being a retired 70 year old and the Defendant company.

[31] In the Belizean case of ***Tillett v Young Barrow et al*** **No. 778 of 2010 (decision of 19 April 2010)** an application for permission to amend a claim was filed after the first hearing and two working days before the date of hearing. The court had to determine whether it was just to allow the amendment at all or at that late stage. **Awich CJ (Ag)** expressed disappointment at the parties filing applications mere days before the date of hearing the substantial claim. He said:

> "… I expressed great disappointment at the parties filing interlocutory applications a mere two working days before the day appointed for trial to commence … I was greatly disappointed because the hearing of the applications could cause the hearing of the substantive claim to be adjourned, or delayed and not completed within the two days allocated for trial. It has been said that trial is no longer a matter of ambush; it seems ambush is still very much on the minds of some attorneys, including senior attorneys."

[32] **Awich CJ (Ag)** went on to say:

> "4. The application of the claimant sought orders to amend his claim. All the amendments were not matters that arose after the first hearing/case management conference on 19.1.2011, at which the hearing dates were agreed. The claimant should have raised the amendments then…

> 6. Attorneys are required to make proper use of the time allocated for case management conference or first hearing and pre-trial review in order to avoid using part of the day allocated for trial for businesses that belong to case management conference or first hearing or pre-trial review. That way adjournment or delay of trial will be avoided.
>
> 7. In these proceedings all parties attended the usual first hearing on 20.12.2010 and 19.1.2011, as required. Matters that were outstanding were raised and direction orders were made about them; otherwise parties informed the judge (myself) that the case was ready for trial. It is disappointing to go back to case management business on the day of trial. (emphasis mine)

[33] It was held that it was just to all parties for the amendment be allowed so that the details in the law could be addressed fully.

[34] Here, it must be pointed out that the provision of Part 20 of the Barbados CPR must be contrasted with those in Belize (rule 20.1(3)), since it does not contain a rule which provides that the court may not give permission to change a statement of case after CMC unless the applicant can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that CMC.

[35] In ***Simpson v Island Resources Limited*** **Cv 1012 of 2005 (decision of 24 April 2007, Jamaica)** the parties to the proceedings were also parties to a lease agreement. It was alleged that there was an implied term that the premises would be water tight. Heavy rains and the lack of water tightness resulted in damage to property and loss of income and loss of profit.

The loss of profit and income were stated in the statement of claim but not the quantification of the loss. Counsel for the Claimant stated that this was an oversight but applied to add the words and figure in the sum of $7.5 million dollars to the particulars of claim as the sum representing loss of income.

[36] The court granted permission to the applicant to amend the statement of case. The court observed that the amended rule 20.4(2) of the Jamaica CPR replaced the old 20.4(2) (equivalent to rule 20.1(3) Belize CPR). At paragraph 6, Sykes J stated that, "the old rule did not have much scope for flexibility and the rules committee was of the view that it should confer upon the judge greater discretion to deal with amendments after case management conference". However, he cautiously observed that the amendment of the rules as stated above is not a licence for negligence or extreme carelessness.

[37] The Pre-CPR case of ***Worldwide Corporation Ltd v GPT Ltd et al*** **[1998] EWCA Civ 1894**, interpreted as encapsulating the legal principles and considerations found in the overriding objective (**rule 1**), concerned an application for leave to appeal orders of a trial judge refusing the plaintiffs' applications for leave to amend the re-amended points of claim. The court observed that the proposed amendment was not sought because of the discovery of some fact previously unknown or some change in the law but

because counsel felt that the amendment was the only arguable basis on which it could put the case.

[38] In ***Worldwide Corporation Ltd (supra)*** **Waller LJ** stated:

> "Take this very case. By attempting to make a last minute amendment a trial has had to be interrupted by argument over some days, the challenge to the judge's order has had to be dealt with by the Court of Appeal as a matter of urgency with serious disruption to its list and other litigants, and if the amendment was allowed there would have to be a further delay in the trial coming on and/or a last minute lengthening of the trial which may cause serious inconvenience in the Commercial Court and thus to other litigants.
>
> The appreciation of the injustice to other litigants and the damage to parties in trials being delayed which cannot adequately be compensated by an order for costs has led the court to a more interventionist approach in the management of trials, and has furthermore led to appellate courts being very reluctant to interfere with decisions of judges who with all those interests in mind have taken decisions at interlocutory stages. Mr Brodie referred us to the judgment of Millett LJ in *Gale v Superdrug Stores Plc* [1996] 1 W.L.R. 1089 at 1098E where he said this:-
>
> "Litigation is slow, cumbersome, beset by technicalities, and expensive. From time to time laudable attempts are made to simplify it, speed it up and make it less expensive. Such endeavours are once again in fashion. But the process is a difficult one which is often frustrated by the overriding need to ensure that justice is not sacrificed. It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.
>
> The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of

> the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice."

[39] There, the court found the views of Lord Griffiths in ***Ketteman v Hansel Properties*** **[1987] AC 189** at **220 A-H** to be particularly instructive.

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings."

[40] In my view, joining ESSCO as a party in order to resolve the matters in the dispute outweighs dismissing the Claimant's application, in keeping with the Court's overriding objective to deal with cases justly. Mindful of the foregoing, I note that if the Claimant's application is dismissed it may necessarily mean a new action will be instituted against ESSCO and further costs, time and court resources expended thereby defeating the overriding objective.

Conclusion

[41] I am of the view that the Court should allow the Claimant's application to join ESSCO as a party to the proceedings.

[42] As regards the application to add ESSCO it is my opinion that the Court should award costs against the Claimant to be agreed or assessed.

[43] That leave be granted to the Defendant to appeal.

RANDALL WORRELL
Judge of the High Court