[2020] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 101/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**SUPERCLUBS INTERNATIONAL LIMITED**	**APPELLANT**
AND	**MARGARET BLAGROVE**	**RESPONDENT**

Mrs Nickeisha Young Shand instructed by Earle & Wilson for the appellant

Lemar Neale instructed by Bignall Law for the respondent

10 May 2019 and 10 June 2020

MCDONALD-BISHOP JA

[1] This is a procedural appeal brought by Superclubs International Limited ("the appellant") from the decision of Palmer-Hamilton J (Ag) (as she then was) made in the Supreme Court on 12 October 2018. Palmer-Hamilton J (Ag) ("the judge"), upon the application of Ms Margaret Blagrove ("the respondent"), ordered, among other things, that VRL Management Limited and BRL Limited were to be substituted for the appellant as the defendants in a claim brought by the respondent against the appellant.

[2] Although the matter was filed as a procedural appeal for consideration on paper, the court considered it necessary to hear oral arguments from counsel in open court. The respondent had raised a point *in limine* in responding to the appeal that the appellant had no *locus standi* to bring an appeal against the decision made to replace it as the defendant in the proceedings in the court below.

[3] After hearing oral arguments from counsel in open court, we agreed with the submissions of the respondent, upheld the preliminary point and struck out the appeal with costs to the respondent. Although the court had orally indicated its reasons for doing so during its discourse with counsel at the hearing, it was considered useful to reduce them to writing at a later date. These are the written reasons for the decision of the court as promised.

The background

[4] On 19 September 2012, the respondent initiated a claim in the Supreme Court against the appellant for damages for personal injuries she sustained on 24 April 2010, at the Breezes Resort and Spa Trelawny. The respondent alleged that during the course of her employment, she was walking with garbage towards a compactor when she slipped and fell on a wet surface. She further alleged that at the material time, she was employed to the appellant as a housekeeper.

[5] Prior to the filing of the claim, the respondent's attorneys-at-law wrote to Breezes Resorts and Spa Trelawny, advising them of the incident and of the respondent's injuries. The appellant's insurers responded to the letter confirming that it

represented the appellant, "[its] respective subsidiaries, associate[s] and affiliate[s]" as their insured and ascribed liability to the appellant.

[6] On 1 February 2013, the appellant filed its defence to the claim in which it denied liability on the basis that it was not the proper party to the claim, as it was not the respondent's employer. It averred that Breezes Resort and Spa Trelawny was not its subsidiary and that the respondent was, at all material times, employed to VRL Management Limited.

[7] On 23 June 2017, being four years after the denial of liability by the appellant, the respondent filed an application to substitute VRL Management Limited for the appellant. That application was subsequently amended on 10 November 2017, to include an application to substitute BRL Limited, as the second defendant.

[8] The amended application was heard by the judge, who after considering the submissions of the parties, made orders as follows:

> "(1) The Ruling already made with respect to how to treat with the without prejudice document on July 12, 2018 stands;
>
> (2) [VRL] Management Limited and BRL Limited be substituted as 1st and 2nd Defendants in these proceedings;
>
> (3) Permission be granted for the [respondent] to serve the Amended Claim Form and Particulars of Claim and all subsequent processes filed herein out of the jurisdiction on BRL Limited;
>
> (4) The Defendants be permitted to file their Acknowledgment [sic] of Service and Defence within

twenty-eight (28) days and fifty-six (56) days respectively after service of the Amended Claim Form and Particulars of Claim;

(5) The time for filing and serving this application on BRL Limited is abridged;

(6) Cost [sic] of this application be costs in the Claim;

(7) Parties referred to mediation to be completed within ninety (90) days of this Order;

(8) [Respondent's] Attorney-at-Law to prepare, file and serve Orders herein;

(9) Leave to appeal granted."

The appeal

[9] The appellant filed its notice of appeal on 24 October 2018, and amended it on 26 April 2019, challenging several findings of fact and law of the judge. The grounds of appeal were as follows:

"i. The Learned Judge erred in granting the application in circumstances where the Respondent failed to explain the delay in making her application to substitute the Defendant;

ii. The Learned Judge erred in allowing the Respondent to rely on a without prejudice letter dated April 4, 2011 sent by the Appellant's insurers to the Respondent's Attorneys;

iii. The Learned Judge failed to appreciate that the Appellant notified the Claimant that she had sued the wrong party from February 1, 2013 in the Defence filed;

iv. VRL Management Limited was identified as the proper party/employer by the Appellant in its Defence;

v. The Respondent's pay slips were exhibited in support of same;

vi. The Learned Judge failed to appreciate that the delay would prejudice VLR Management Limited and BRL Limited; and

vii. The learned judge erred in allowing the inclusion of BRL Limited as a party to the claim who is not the proper party and who the Respondent failed to prove was her employer."

[10] In essence, the appellant's main contention on appeal was that the judge erred by exercising her discretion to:

i. grant permission to the respondent to substitute VRL Management Limited and BRL Limited as defendants; and

ii. rely on the "without prejudice" letter from its insurers.

The preliminary point

[11] The respondent's initial response to the appeal was by way of a preliminary point that the appeal should be struck out as the appellant had no *locus standi* to commence the appeal on the grounds contended. Counsel for the respondent submitted, in support of this objection, that an order substituting two entities, as defendants in the proceedings below, with an order for service of the amended claim on them, meant, in effect, that the appellant was no longer a party to the proceedings. Also, the position taken by the appellant in the proceedings on appeal is contrary to its position in the court below, where it contended that it was not the proper party sued as it was not the respondent's employer. Counsel for the respondent pointed out that the appellant is

now aggrieved by the decision of the judge even though, in effect, it successfully defended its position in the court below that it was not the respondent's employer and ought to be removed as a party to the proceedings.

[12] The appellant's response was that it was not the proper defendant to the claim because the respondent is not its employee, as was averred in its defence. However, as the party to the claim at the time the order for substitution was made, it was the aggrieved party. Its grievance with the order for substitution, in respect of which the appeal was filed, emanated it said, from its connection with VRL Management Limited and BRL Limited and its interest in protecting them, as its affiliates.

Discussion and disposal of the preliminary point

[13] Rule 19.3(1) of the Civil Procedure Rules, 2002 ("the CPR") confers power on the Supreme Court to substitute a new party for an existing party in civil proceedings under specified circumstances. The judge, based on that provision, had substituted new parties for the appellant.

[14] The submissions of Mr Neale that the order for substitution would mean that the appellant had no *locus standi* to bring the appeal because it was removed as a party in the proceedings below, was not accepted as being entirely accurate. The fact that an order for substitution was made would not have precluded the appellant from bringing an appeal against the order of the judge. It could have been properly aggrieved by that order, despite the fact that new parties were substituted.

[15] The order for substitution, even though it would have had the effect of replacing the appellant in the proceedings below, could not have deprived it of the legal right or *locus standi* to bring an appeal against that order. As the existing party to the claim at the time the order was made, the appellant could have been aggrieved by matters that led to, or resulted from, the decision of the judge. An adverse costs order, for instance, would be an obvious example. Therefore, the mere fact that the new parties were substituted as defendants, resulting in the replacement of the appellant in the claim, was not determinative of its *locus standi* on the appeal.

[16] The core issue that arose for consideration on this application for the appeal to be struck out was whether, the appellant, as a party in the proceedings below who had been replaced or removed, had shown, by its grounds of appeal, that it had a reasonable basis for bringing the appeal against the decision of the judge.

[17] The more specific question, in my view, was whether the appellant, in the light of its defence, which led to the substitution of its affiliates, and its resultant replacement in or removal from the proceedings, could properly have brought the appeal on the grounds it did.

[18] The judge had made no order that may properly be said to have been adverse to the interests of the appellant that formed the subject matter of the appeal. Even though the judge relied on the letter from the appellant's insurers, it was not detrimental to the position taken by the appellant that it was not a proper party to the proceedings. Raising the reliance on the letter, as an issue in the appeal, would have been of pure

academic interest insofar as it would have related to the appellant, itself, because the order for substitution did not prejudice its position as the wrong party sued, which the judge clearly accepted.

[19] The appellant's position that it was the proper party to bring the appeal, on the grounds filed, simply because it had an interest in protecting its affiliates was not accepted for reasons, which will now be outlined.

[20] The appellant continued to contend that it was not the proper defendant; yet, it complained in ground of the appeal (i) that the application to substitute another defendant ought not to have been granted. The order for substitution would have had the ultimate effect of replacing or removing it as defendant, which must have been its objective in denying liability and naming its defence, VRL Management Limited as the proper defendant. If no substitution were ordered, then the appellant would have remained the sole defendant in the proceedings, despite its clear and unequivocal defence that it was not the proper defendant. There is nothing to indicate that it had made an application for summary judgment or for the claim to be struck out on the basis of the averment in its defence that it was the wrong party sued. It seems from the record of appeal that the matter was proceeding between the appellant and the respondent until the application for substitution was made.

[21] It would have meant, in effect, that without an order for substitution, the claim would have proceeded to trial with the wrong defendant, thereby, ultimately, either defeating the respondent’s claim or having judgment entered against a party that is the

wrong defendant. The appellant, however, had pointed to who it alleged was the employer of the respondent (and so, ostensibly, who would have been the proper defendant). After that same party was substituted, it then sought to protect the interests of that party on appeal after it was substituted as a party to the proceedings. These two positions taken by the appellant were irreconcilable, particularly in the absence of express authority from that party, for the appellant to make representations on its behalf.

[22] Furthermore, and even more importantly, although the appellant sought to advance the appeal "to protect its affiliates", it had not filed the appeal in a representative capacity or, otherwise, provided anything to the court to show that it was lawfully authorised by the new parties to act on their behalf for the purposes of bringing the appeal. This is against the background that the notice of appeal was amended as late as April 2019, which was nine months or so after the order for substitution was made, with a consequential order that the amended claim and particulars of claim be served on the new parties.

[23] If the new parties, or any of them, should raise objection to the order for substitution, an avenue would be available by way of the CPR for the order made against them to be set aside, for the claim against them to be struck out or for summary judgment to be entered in their favour. If unsuccessful in any such application, they would then have the right of appeal to this court. In sum, the new parties are not without recourse to the machinery of the courts to challenge the respondent's belated claim brought against them.

[24] In the final analysis, the appellant had failed to show any basis on which it could properly have brought the appeal on the grounds it did. Therefore, even though the mere substitution of the new parties as defendants would not have been sufficient or effectual, in and of itself, to deprive the appellant of the *locus standi* to bring an appeal, the court, nevertheless, had to be satisfied that it had a reasonable basis for bringing the appeal. This is in keeping with the case management powers of the court, which it is obliged to exercise in accordance with the overriding objective.

[25] It was clear that the amended notice of appeal had disclosed no reasonable grounds for bringing the appeal against the respondent, in all the circumstances of the case.

[26] It was for the foregoing reasons that I concurred in the decision of the court as indicated at paragraph [3] above.

P WILLIAMS JA

[27] I read, in draft, the reasons for judgment of McDonald-Bishop JA and agree. There is nothing that I wish to add.

EDWARDS JA

[28] I have also read, in draft, the reasons for judgment of McDonald-Bishop JA, I agree and wish to add nothing further.