COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2019/CLE/gen/00156
2019/CLE/gen/00157
2019/CLE/gen/00158

BETWEEN

DARNELLE OSBOURNE
NICOLA THOMPSON
ROY NICHOLAS DEAN

Plaintiffs

AND

THE HONOURABLE THOMAS DESMOND BANNISTER
(In his capacity as the Minister of Public Works and the Minister charged with the responsibility for the Boards of BPL and BEC)

First Defendant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
(In a Representative capacity)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Alfred Sears QC with him Mr. Moreno Hamilton of Sears & Co. for the Plaintiffs
Mrs. Krystal Rolle of Rolle & Rolle for the 1st and 2nd Defendants
Mr. Oscar Johnson Jr. and Mr. Keith Major Jr. of Higgs & Johnson for BPL and BEC

Hearing Date: 17 December 2019

Civil Practice and Procedure –Application to amend Writ of Summons and Statement of Claim – Joinder of parties – Discretion of the Court –Whether just to allow amendment – Whether amendment will cause injustice to the other parties – RSC Ord. 20 rr. 5, 7 and Ord. 15 r. 6

This matter is in the early stages of litigation. The Plaintiffs filed their respective action against the Defendants on 12 February 2019.

On 22 August 2019, the Plaintiffs filed Amended Summonses (with supporting Affidavits) to amend the pleadings to*, inter alia*, add two additional Defendants to the action namely: Bahamas Electricity Corporation ("BEC") and Bahamas Power and Light Company Limited ("BPL"). The proposed amendments do not raise a new claim and the limitation period on the cause of action has not yet expired.

For convenience, the present applications for joinder and to amend the pleadings were heard together although there has been no request or order to consolidate the three actions.

The proposed Defendants, BEC and BPL, seek leave to appear conditionally and to oppose the Amended Summons on the basis that they would suffer an injustice and be prejudiced as there is no matter of controversy as between them and the Plaintiffs.

HELD: allowing the Amended Summons to amend to, *inter alia, add BEC and BPL as Defendants to the proceedings. BEC and BPL are necessary parties to the dispute and their joinder to the action would not embarrass or prejudice them nor the other defendants. Cost to the Defendants*

1. The Court has the jurisdiction to allow an amendment at any stage of the proceedings including an amendment to allow the joinder of additional parties to an action as expressly provided for in Ord. 20 r. 5 and Ord. 15 r. 6 of the Rules of the Supreme Court ("RSC").

2. In exercising its discretion, the Court must look at each case on its own particular facts and circumstances to determine whether there is any injustice and whether cost will compensate: see: Crane-Scott JA in **Bahamas Telecommunications Company Limited v Island Bell Limited** SCCivApp No. 188 of 2014.

3. There was no inordinate delay in the conduct of the action as the proceedings are still in the early litigation stage.

4. The application to amend essentially seeks to add two additional parties and not to introduce or add a new cause of action. The limitation period on the causes of action as set out in the pleadings had not yet expired.

5. The amendments also seek to add BEC and BPL to address issues regarding its Board of Directors which was already pleaded and should the Plaintiffs succeed in the action, it may be that they may be called upon to compensate or contribute to compensation for damages and losses. Therefore, BEC and BPL are necessary parties to the Action.

6. There is no evidence of what actual prejudice has or may have been caused to BEC and BPL for which it cannot be compensated by an order for costs.

RULING

Charles J:

Introduction

[1] On 22 August 2019, each of the Plaintiff filed a similar Amended Summons seeking leave of the Court to amend their respective Writ of Summons and Statement of Claim to add the Bahamas Electricity Corporation ("BEC") as the Second Defendant and Bahamas Power and Light Company Limited ("BPL") as the Third Defendant to their respective action. The Summons was made pursuant to Order 20 Rule 5 of the Rules of the Supreme Court, 1978 ("RSC Ord. 20 r. 5").

[2] For convenience, the three Summonses were heard together although there has been no request or order to consolidate the three actions.

[3] BEC and BPL seeks leave of the Court to conditionally appear in each action in order to oppose the application on the ground that they are not proper or necessary parties and therefore, they are not needed to determine the issues raise in the Plaintiffs' pleading. Further, they say that adding them to the action would be an injustice and prejudicial to them.

Dramatis personae

[4] The Plaintiffs were former members (holding prominent positions) of the Board of Directors of BEC and BPL. In their respective pleadings, they claim, among other things, damages against the Defendants for wrongful dismissal, misfeasance and slander.

[5] The First Defendant is a member of the Government of The Bahamas and the Minister of Public Works with responsibility for the Boards of BEC and BPL. The Second Defendant is being sued as a representative of the Crown pursuant to the Crown Proceedings Act.

[6] BEC is a Statutory Corporation existing and operating under the Electricity Act, 2015 and BPL is a Bahamian company incorporated on 15 September 2015. It is purportedly owned and controlled by BEC.

The law

[7] It is accepted that the Court has the jurisdiction to allow an amendment at any stage of the proceedings as expressly provided for in RSC Ord, 20 r. 5. While the Court is vested with wide powers to amend even at a late stage, such discretion must be exercised sagaciously and not whimsically or capriciously. This is especially so where the amendment sought, if granted, will result in an adjournment or delay of the proceedings.

[8] RSC Ord. 20 r. 5 provides as follows:

> **"5. (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.**
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> **(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.**
>
> **(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.**
>
> **(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ of the making of the counterclaim, as the case may be, he might have sued.**
>
> **(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out**

of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

[9] RSC Ord. 20 r.7 provides:

"7. (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) This rule shall not have effect in relation to a judgment or order."

[10] The Bahamas Court of Appeal addressed the issue of amendments in **Bahamas Telecommunication Company Limited v Island Bell Limited** SCCivApp No. 188 of 2014. Crane-Scott JA, in delivering the judgment of the Court stated:

"[22]. The Notes in the White Book (Supreme Court Practice 1993) which explain the operation of Order 20 rule 5 suggest that the aforementioned rule ought to be read together with rule 8, which states:

"8. - (1) for the purpose of determining the real controversy between the parties to any proceedings or of correcting any defect or error in any proceedings, <u>the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct</u>. (2)…"

[23] Bowen L.J in *Cropper v Smith* (1883) 26 Ch D. 700 at 710- 711 stated the general principles for granting leave to amend. He said:

> **<u>"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters of controversy, and I do not regard such amendment as a matter of favour or grace…It seems to me that as soon as it appears</u>**

that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

[24] As previously noted, such amendments should only be allowed if they can be done without injustice. In determining whether there is injustice, the court must consider the lateness of the application; the sufficiency of the reasons for the late application; whether a fair trial and the determination of the issues would be compromised by the granting of leave; and whether costs would compensate."[Emphasis added]

[11] In the case of **McPhee v Nesbitt and another** (2014) CLE/gen/01654 (unreported), this Court stated at para. 20:

"The court has a very wide discretion as to whether to make the order. As with amendments generally it is likely that the application will be granted if it does not cause injustice to the other which cannot be compensated in costs."

[12] RSC Ord, 15 r. 6 which deals with misjoinder and non-joinder of parties provides:

"6. (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely-

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

> **(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter,**
>
> **but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."**

[13] In the case of **TSB Private Bank International SA. v Chabra and another (1992) 2 All ER 245** Mummery J held that:

> **"Where the presence of a third party before the court was necessary to ensure that all matters in a dispute were effectively dealt with, the court was entitled to join the third party as a proper party to the proceedings pursuance to Order 15 r. (a)(b)(ii), even though there was no cause of action against the third party."**

[14] Our Court of Appeal in **Belgravia International Bank & Trust Company Limited et al v CIBC Trust Company (Bahamas) Limited** [2014] 1 BHS J. No. 58, discussed the Court's approach to RSC Ord. 20 r.5:

> **"144. Order 20, rule 5 (1), RSC, does however, provide that amendments may be made to a writ or pleading at any time. This state in terms as follows:**
>
> **"(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, <u>the Court may at any stage of the proceedings allow</u> the plaintiff to amend his writ, <u>or any party to amend his pleading</u>, on such term as to costs or otherwise as may be just and in such manner (if any) as it may direct." (Underlining added for emphasis).**
>
> **145. <u>The discretion granted to the Court in relation to amendments is one, like all judicial discretion, that must be exercised judicially</u>."** [Emphasis added]

[15] In **G.L. Baker Ltd. v Medway Building And Supplies Ltd.** [1958] 3 All E.R. 540, the Court stated the principle to be followed when granting leave to amend pleadings. Jenkins LJ stated at page 546:

> **"I should ... make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying <u>that there</u>**

> **<u>is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned judge which with this court should not in ordinary circumstances interfere unless satisfied that that the learned judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties.</u> Bearing that in mind, I will refer to some of the authorities read in the course of the very full argument on this matter. One begins with R.S.C., Ord. 28, r.1, which is in these terms:**
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> **'The court or judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleading, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.'**
>
> **"I repeat the second half of the rule 'and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.'**
>
> **I do not read the word 'shall' there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made 'as may be necessary for the purpose of determining the real questions in controversy between the parties'".**

Discussion and disposition

[16] The legal principles set out above are clear in that the court has a wide discretion to allow amendments to pleadings including amendments to add parties. Unquestionably, each case must be looked at on its own peculiar facts and circumstances. From a reading of all of these cases, there are some factors that the Court have to consider but the one that stands out is that no amendment should be granted if doing so will cause injustice to the other parties.

[17] Equally, I guided by the principle that such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy before the parties.

[18] I agree with learned Queen's Counsel for the Plaintiffs, Mr. Sears that the proposed amendments, having been applied for at such an early stage, would not prejudice

the Defendants nor cause injustice to BEC and BPL. In addition, the amendments are necessary to determine all of the issues in controversy between the parties.

[19] In the present case, the Plaintiffs were members of the boards of BEC and BPL. In their respective pleadings, they have raised issues of corporate governance and their wrongful termination from those boards. In this regard, it seems plain that BEC and BPL are necessary parties to this action and, in my considered opinion, ought to have been included as Defendants to the action from the very outset.

[20] There is no evidence of what *actual* prejudice has or may have been caused to BEC and BPL for which they cannot be compensated in costs.

Conclusion

[21] For all of these reasons, I will grant the amendments shown in red on the draft Writ of Summons and the draft Statement of Claim attached to the Re-Amended Summons filed on 11 December 2019. I will also order that each Plaintiff pays costs in the sum of $800 to BEC and BPL since had they been added as defendants from the outset, these applications would have been unnecessary.

Dated this 23rd day of January, A.D., 2020

Indra H. Charles
Justice