IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF

MONTSERRAT

(CIVIL)

CASE NO: MINIHCV2015/0002

BETWEEN:

KEVIN WEST
YVETTE SWEENEY **Applicants**

AND

SHAMROCK INDUSTRIES LTD.
PLANNING AND DEVELOPMENT AUTHORITY
THE ATTORNEY GENERAL **Respondents**

Appearances:

Dr. David Dorsett for the Applicants
Mr. David Brandt for the 1st Respondent
Miss Karen Reid for the 2nd and 3rd Respondents

2015: November 28
2016: March 10

Judgment

[1] Redhead, J. (Ag): The applicants herein Kevin West and Yvette Sweeney apply to the court for the following order.

(1) Nigel Osborne Enterprise Limited be substituted in this matter in the place of Shamrock Industries Ltd.

[2] This application is governed by Part 19[1]:

[3] Rule 19.2 (5) provides, "the Court may order a new party to be substituted for an existing one if the:

(a) Court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or

(b) existing party's interest or liability has passed to the new party."

[4] Rule 19 (3) (2) an application for permission to add, substitute or remove a party may be made by:

(a) An existing party; or

(b) A person who wishes to become a party.

[5] The grounds of the application are:

(1) By a fixed date Claim Form filed on 16th February 2015. The applicants sought an order seeking among other things an injunction against Shamrock Industries Ltd prohibition from proceeding with development to property adjacent to the applicant's property.

(2) It has come to the attention of the Applicants that the entity that is actually doing the said development is Nigel Osborne Enterprises Ltd.

(3) It is also now evident that the principal behind both Shamrock Industries and Nigel Osborne Enterprises Ltd is Mr. Nigel Osborne.

(4) Mr. Osborne has deposed several affidavits in the matter but he has failed to disclose that the planning, permission and development that lies at the instant matter is planning permission granted to his company , namely

[1] CPR 2000

Nigel Osborne Enterprises Ltd and that likewise the Contested development is development being undertaken by the said Nigel Osborne Enterprises Ltd.

(5) Mr. Osborne has fully participated in the proceedings from the outset. Since the Contested development involves Nigel Osborne Enterprises Ltd (and not Mr. Nigel Osborne's other company, the currently names 1st Respondent). It is proper that the real party involved in the instant case as a matter of fact be substituted instead of the currently named 1st Respondent.

(6) The Court has the power to substitute a party at this stage of the proceedings.

(7) The Court is duty bound to look into the substance of the matter.

(8) Nigel Osborne Enterprises Ltd was under a duty of candor which it failed to properly discharge.

(9) The court can resolve the matter in dispute more effectively by substituting Nigel Osborne Enterprises.

[6] **The first question I need to answer in order to exercise my discretion in substituting the new party, is whether the court can resolve the matter in dispute more effectively by substituting Nigel Osborne Enterprises in place of Shamrock Industries Ltd?**

[7] **Mr. Brandt, learned counsel, for the first respondent argues that Nigel Osborne Enterprise and Shamrock Enterprises are separate companies I suppose that learned counsel was making the point that these companies have separate legal entities.**

[8] **This in my view, is so, and cannot be questioned. But having distinct legal entity, would that be a bar to substitution of one party for the other. I think not, because if e.g. the court were to substitute e.g. John Brown for Tom Smith. Which is on the face if it is permissible? That would be entirely two legal entities.**

[9] **So on the face of the application in my opinion, it cannot be wrong to allow the substitution merely on the ground that it is two separate legal entities.**

[10] **The important issue to be considered in my view is whether the court can resolve this matter in dispute more effectively by substituting the new party for the existing party i.e. by substituting Nigel Osborne in place of Shamrock Industries. I would add whether by doing so any injustice would be caused.**

[11] **In an affidavit sworn to by Mr. Fitzroy Buffonge, Attorney at Law holding papers for Dr David Dorsett for the applicants deposed on behalf of first and second applicants.**

That on 14th January 2015 the applicants applied for, among other things an injunction against the Shamrock Industries Ltd carrying on business for a Lumber yard mining and other industrial activities in Brades in plain view of the applicant's property.[2] This application was in response to certain developments that was undertaken on property adjacent to the applicant's property.

[12] **Mr. Nigel Osborne, known by the applicants, to be the principal of Shamrock Industries Ltd, known to be behind the development.**

[13] **In an affidavit deposed by the Chief Physical Planner made on behalf of the Planning and Development Authority (''The Authority'') and filed on 22 January 2015. Mr. Meade deposed that:**

(a) ''The property was (had) been cleared by Mr. Osborne known to be the director of Shamrock Industries Ltd and Mr. Osborne subsequently informed by officers of The Authority that he had no permission to undertake the

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[2] **2 See Rule 19.2(5) (a)**

development. Mr. Osborne informed the officer that he did not know that planning permission was needed for the development.

(b) Mr. Osborne subsequently visited The Physical Planning Unit to collect an application form for planning permission.''

[14] By paragraph 4 of his affidavit Mr. Buffonge deposed:

''In an affidavit bitterly opposing the application for an injunction also filed on 22 January 2015. Mr. Nigel Osborne identified himself as the Director of Shamrock Industries Ltd and deposed that the applicants undertaking in damages be secured by payment into Court of an appropriate sum in order or in order (sic) to reinforce (The Applicant's) undertaking be required to deposit a lump sum of money with our Legal representative jointly.'' Mr. Osborne further deposed that the 1st Respondent [Shamrock Industries Ltd] denies that it intends or has carried out any development activity as alleged' Mr. Osborne failed to disclose his relationship with Nigel Osborne Enterprises Ltd or the fact that Nigel Osborne Enterprises Ltd had intended and/or carried out the industrial development alleged by the Applicants.''

[15] By paragraph 8 Mr. Buffonge deposed:

''On the 25th April 2015 Mr. Nigel Osborne deposed an affidavit in reply to a Fixed Date Claim Form filed in which he deposed that he was a Director and Shareholder of Shamrock Industries Ltd along with another company called Nigel Osborne Enterprises . Mr. Osborne further deposed that '' I have full knowledge of the facts of the case in so far as the 1st Defendant is concerned.'' Mr. Osborne failed to disclose that he also had full knowledge of the facts of this case as far as Nigel Osborne Enterprises Ltd would be concerned.''

[16] **It seems to me that Mr. Buffonge is placing a lot of emphasis on the fact that Nigel Osborne failed to disclose to the applicant certain information. I fail to appreciate that Mr. Nigel Osborne had a duty under these circumstances to make a disclosure to the Applicants. In fact, if Mr. Nigel Osborne swore that he was a Director of Nigel Osborne Enterprises Limited, in my view it was reasonable for it to be assumed that he had full knowledge of that Company.**

[17] **The applicants filed a Fixed Date Claim Form alleging that Shamrock Industries had decided to develop the property and it was for industrial purposes and that no planning permission was granted to Shamrock Industries.**

[18] **This is my mind set at the tone or genesis for the actions against the Respondents. On the 19th of February 2015 the Applicants obtained an interim injunction against the first Respondent Shamrock Industries Ltd.**[3]

[19] **Nowhere in the Claim Form is the 2nd named Respondent mentioned. It is true that Nigel Osborne in his affidavit of 28th February 2015 deposed inter alia:**

> **''I am Director and Shareholder of the first Respondent Company along with other company Nigel Osborne Enterprises. I have full knowledge of the facts of this case in so far as the first Defendant is concerned and I am duly authorized to make this affidavit on its behalf.''**

[20] **Mr. Buffonge, Attorney-at-Law in his affidavit criticized the fact that Mr. Nigel Osborne did not reveal in his affidavit that he has full knowledge of the facts of the other company Nigel Osborne Enterprises.**

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[3] **2 See Affidavit of 1st Applicant paragraph 12**

[21] **In my considered opinion by just mentioning that fact, would not that have prepared the Applicants to substitute the Nigel Osborne enterprises for Shamrock Industries Limited? It seems to me that at the time, the Applicant's mindset was that the first Respondent was the company that intended to develop the property and this property was for industrial use for which there was no prior planning permission.**

[22] **It was the first Respondent Shamrock Industries Ltd, the Applicants said failed to notify them, the Applicants, of the development as it was smack in the middle of their view of the sea from their verandah.**

[23] **In fact on 6th February 2015 the Applicants obtained an order of injunction against the First Respondent:**

> **''Until the final determination of the matter the First Respondent be restrained from carrying out any industrial activity such as mining of sand on property known as Block 13/1/19.''**

[24] **Dr. Dorsett referred me to Judicial Review Handbook Principles. The short answer is that this is not a Judicial Review matter. Dr. Dorsett also referred to (Quorum) Island (BVI) Limited and Virgin Islands Environmental (council) and the Minister of Planning.[4]**

[25] **In that case, the Council, the first Respondent, issued a Claim Form, by which the Claimant, the Council instituted the claim in 2007 against the Chief Minister, Minister of Planning, and the Attorney General as defendants. On 28th September 2008 the Court granted leave to Quorum Island to be joined as an interested party. On 7th November 2007, the Attorney General was substituted as the sole defendant.**

[4] HCVAP 2009/21 BVI

[26] **At the beginning of the trial, the judge ruled that the Attorney General was a proper defendant and that there was no need to add the Minister.**

[27] **Mr. Brandt on behalf of the first respondent contended that the issues in Quorum Island were different from those in the instant case there were two separate entities.**

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[28] **Rawlins C.J at paragraph 29 opined:**

> **''…….Given the pleadings and the evidence; given how the issues in this case turn mainly on the operation of law; given the involvement of the Solicitor General on behalf of both in this case. I do not think this is necessary to provide any consequential directions for the rejoinder of the minister as defendant/respondent and the removal of the Attorney General.''**

[29] **It must be borne in mind that this was a ''rejoinder'' of a party. On the other hand in the case at bar the application is to substitute Nigel Osborne Enterprise Ltd which was never a party to the action. In my opinion that is the main difference between Quorum Island and the instant case.**

[30] **It is true that Mr. Nigel Osborne is the director of both companies; Shamrock Industries Ltd and Nigel Osborne Enterprises Limited. He is the eyes and brains of both companies. (See Henshall [John Quaries] Ltd v Harvey)[5].**

[31] **Mr. Brandt further argued that on 21st March 2015 the claimant knew that Nigel Osborne**

Enterprises Limited had made an application for planning permission. No application was made then to Substitute Nigel Osborne Enterprises for Shamrock Industries Ltd.

[5] 5 1965 1 ALLER 725

[32] **Mr. Brandt further contended that on 30th June 2015 the Court set a trial date for this matter for 23rd September 2015 and on 18th September 2015 another trial date was set for 13th October 2015.**

[33] **Impliedly Mr. Brandt is urging that if the applicants' application is granted, another trial date would have to be set.**

[34] **Finally Mr. Brandt referred to R v Barnsley Metropolitan Borough Council Ex parte Hook[6]. Miss Reid learned counsel on behalf of 2nd and 3rd Respondents contended that the applicants were far from being candor. They were aware that the application was made by Nigel Osborne Enterprises Limited and took no steps to amend their claim. I would say amend the parties to their claim rather than their claim.**

[35] **Miss Reid referred to Thakur Persad Jaroo v Attorney General of Trinidad and Tobago[7] At paragraph 36 of the judgment Lord Hope of Craighead opined:**

> **'' But instead of amending his pleadings to enable him to pursue the common Law remedy that had been available to him, the appellant chose to adhere to what had become an unsuitable and inappropriate procedure.''**

[36] **In my opinion this dictum is of dubious application to the case at bar.**

[37] **In my considered view what Lord Hope was saying was that, it is not in every case where there is a violation of one's rights that one goes to the Constitutional Court to seek redress. There are instances where those violations could be addressed in the ordinary Court. Even if the action is filed in the Constitutional Court there should be an amendment so that it could be brought in the ordinary court.**
Continuing Lord Hope of Craighead said:

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[6] 1976 1 WLR P1052
[7] 7 Privy Council Appeal No 54 of 2000

'' If as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate. Steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.

i.e. to proceed in this case by way of constitutional motion was an abuse of process.''

[38] In Gludston Watson v Rosedale Fernandes[8]

The CCJ was called upon in this appeal to answer two questions:

(1) Is an Attorney-At-Law who is not on the record entitled to sign a notice of appeal on behalf of his client?

(2)The second question arises only if the first is answered in the negative: What consequences should follow if such an attorney does sign the notice of appeal?

[39] The CCJ after examining the relevant Rules of Court, has determined that the first question must be answered in the affirmative.

[40] The Court of Appeal of Guyana of its own motion raised the issue of Mr. Gibson's alleged lack of authority. After submissions on the matter the Court of Appeal ruled that the appeal was a nullity because Mr. Gibson had not placed himself on the record by filing any authority to act, signed by Mr. Watson. The Court of Appeal held that Mr. Gibson was not authorized by the appellant to act on his behalf. The Court struck out or dismissed the appeal for breach of the Rules of Court without any consideration of its merits. Mr. Gibson appealed that ruling to the CCJ.

[8] CCJ Appeal No C of 2006

[41] The judgment of the CCJ was delivered jointly by the Honourable Mr. Justice Adrian Saunders and the Honourable Mr. Justice David Hayton.

At paragraph 36 the learned judges opined:

'' The effect of the Court's decision was to deprive the appellant of the hearing of his appeal on the merits because the Court considered there had been a procedure irregularity. We consider that it should be rare that such a course should be taken, especially when there are a variety of actions open to the Court for dealing adequately with the technical breach. The case could have been adjourned for a short period to permit the breach to be remedied and made that the wasted costs be paid by the appellant or Mr. Gibson personally, but to shut out the litigants entirely from arguing his appeal could not be in the interests of Justice.''

At paragraph 39 the judges observed:

'' Courts exist to do justice between the litigants, through balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency. Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys.''

[42] The learned Justices reminded us of what Chief Justice Wooding said in Baptiste v Supersad[9].

''The law is not a game, nor is an arena. It is the function and duty of the judge to see that justice is done as far as may be according to the merits. In Potter Title and Trust Co. v Lallavo Bros Inc.''[10] Musmemmanno J opined: ''The attainment of true justice is over the highway of realities and not through the alley of technicalities.''

[9] [1967] 12W I R 140 A I 144

[10] 88 A 2 d 91 @ 93 (Pennsylvania 1952)

[43] **In view of the foregoing I have no doubt the proper course to adopt in the interest of justice is to allow the substitution of Nigel Osborne Enterprises Ltd as the first Respondent in place of Shamrock Industries Ltd.**

[44] **By the foregoing, it seems to me therefore that it was Nigel Osborne Enterprises Ltd that made that application and was granted permission to construct the commercial building and not Shamrock Industries Ltd.**

[45] **The Applicants Kevin West and Yvette Sweeney are hereby ordered to serve on the new party Nigel Osborne Enterprises Limited the Claim Form and any other documents.**

[45] **Cost thrown away to be awarded to the respondents, to be agreed, if not agreed, the parties are to file submissions within 14 days from today's date for argument on costs.**

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Albert Redhead
High Court Judge