EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SUIT NO: NEVHCV2014/0030

BETWEEN:

Eustace Nisbett — Applicant

and

Alexis Jeffers
Cardell Rawlins
Leon Lescott
Melissa Seabrookes
Dexter Boncamper — Respondents

(The 1st-6th Respondents in their capacities as members of the N.H.L.D.C)

Appearances: Dr. David Dorset with Mrs. Angela Cozier for the Applicant.
Mr. Terrence Byron for the Respondents.

2016: June 23
2016: November 11

JUDGMENT

[1] WILLIAMS, J.:

The Applicant Eustace Nisbett of Prospect Estate in the Parish of St. John, Nevis filed an application on the 5th March, 2014 for leave to apply for Judicial Review pursuant to Rule 56.3 of the CPR 2000 in particular Rules 56.2 and 56.4 against the Respondents.

[2] The Applicant applied for the following relief:

1. A Declaration that the purported termination of the financial assistance granted to the Applicant by the Cabinet of the Nevis Island Administration in order to pursue an LLB at the University of London via Holborn College was contrary to Law, null and void and of no legal effect.
2. A declaration that the purported decision of the Respondents to dismiss the Applicant for mismanaging the corporation's affairs, and failing to give satisfactory evidence of his enrolment in University for which study leave was granted was unlawful, null and void and of no effect.
3. An order of certiorari quashing the decision of the 1st Respondent to unilaterally terminate the financial grant to the Applicant by the cabinet of the N.I.A in order for the Applicant to pursue his legal studies at Holborn College, London England.
4. An order of certiorari quashing the decision of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents dismissing the Applicant from his position as Manager of the N.H.L.D.C.
5. An order that the 1st, 2nd, 3rd. 4th, 5th and 6th Respondents forthwith reinstate all disbursements and/or salary due to the Applicant and which were terminated with

immediate effect by the N.H.L.D.C by letter of the 13th February 2013, written by the 1st Respondent on behalf of the N.H.L.D.C.

6. An Injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents, whether by themselves, their servants and/or agents from continuing to withhold all or any of the disbursements and/or salary payments lawfully due to the Applicant by the decision of the Board of the N.H.L.D.C on the 13th June, 2012.
7. An order of mandamus requiring the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents to forthwith reinstate the Applicant to his lawful position as Manager of the N.H.L.D.C, or alternatively, to pay the Applicant such sums as would be due to him under clause 8 (1) of the Contract of the 10th March 2011.
8. Aggravated Damages.
9. Vindicatory Damages.
10. Costs.
11. Interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act.
12. Interest pursuant to Section 7 of the Judgment Act.
13. Such other relief as the Court may deem fit.

[3] The Applicant applied for the following relief:

1. That by a contract of service dated 10th March 2011 made between the N.H.L.D.C, a statutory body and the Applicant, the Applicant was employed to perform duties of Manager of the N.H.L.D.C.
2. On the 23rd May 2013, the Applicant wrote to the then Chairman of the N.H.L.D.C, Mr. Robelto Hector requesting study leave and financial assistance to pursue a law degree and also requested financial assistance for his first year of studies in the sum of €9741.

3. That by letter dated 19th June 2012, Mr. Hector replied to the Applicant informing him that the N.H.L.D.C had approved his request for the period September 2012-June 2015 on certain conditions which included the submission of semester reports from the college.

4. That a tuition grant of €9741 was deposited to the Applicant's account on the 12th July 2012 and at the later date the Secretary to the Cabinet of the N.I.A informed the Applicant that the Cabinet had agreed to meet 80% of his Tuition fees and living expenses.

5. That the Applicant commenced his courses in London on the 30th September 2012 but following a change of Administration in Nevis in 2013 the 1st Respondent terminated all disbursements to the Applicant and demanded that he provide official semester reports and proof of enrolment at the College. Despite the information contained in the Applicant's letter of the 11th February 2013.

6. That the Applicant contends that the 1st Respondent summarily dismissed him without affording him a hearing contrary to the Rules of Natural Justice, and despite the requested intervention of the Chief Labour Officer.

[4] Upon hearing submissions of Counsel on both sides the Applicant was granted leave to apply for Judicial Review by this Court on the 1st day of May 2014.

[5] On the first hearing of this matter after cross-examination of the Applicant by Counsel for the Respondents Mr. Terrence Byron, the Applicant conceded that the named Respondents in the matter were not the proper parties to be joined as Respondents and that in accordance with Section 3(4) of the Nevis Land Development Ordinance the proper party to the suit was the Land Development Corporation.

[6] In light of the wording of the Ordinance, Counsel for the Applicant Dr David Dorset made an oral application to the Court that there be a substitution of the parties, and the Court granted leave to the Applicant to file and serve an application to substitute parties within 7 days of the date of the order and to also file written submissions with authorities in support of the application.

[7] Leave was also granted to the Applicant to reply if necessary to the Respondent's submissions and authorities.

Claimant's Submissions

[8] Learned Counsel for the Applicant Dr David Dorset in his written submissions contends that CPR 19.2 (5) provides that the Court may order a new party to be substituted for an existing one if;

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

b) Existing interest or liability has passed to the new party.

[9] Learned Counsel further contends that the power to substitute a party is a discretionary one and that CPR 1.2 provides that the Court must seek to give effect to the overriding objective when it exercises any discretion given to it by the rules or interprets any rule.

[10] Learned Counsel referred to the Court to the cases of Quorum Island (BVI) Ltd vs Virgin Islands Environmental Counsel[1] and Edgecombe vs Antigua Flight Training Centre[2] on the point that "as a general rule a claim does not fail due to non-joinder or misjoinder of parties.

[1] BVIHCVAP2009/021
[2] ANUHCVAP2015/0005

[11] Learned Counsel Dr Dorset contends that in the instant case there was a non-joinder of the (1) Minister of Agriculture, Lands, Housing, Co-operatives and Fisheries and (2) the Land Development Corporation. There was also a misjoinder of the presently named Respondents.

[12] Learned Counsel further contends that it is the decision of the Minister Hon. Alexis Jeffers that is being challenged and it is proper that the Minister be named rather than the holder of the office; also it is the decision of the Corporation that is being challenged as opposed to members of the Board of the Corporation.

[13] Learned Counsel submits that by making the substitution, the Court is able to resolve the matters in dispute more effectively.

[14] Learned Counsel referred the Court to the case of West vs Shamrock Industries [3] on the issue of substitution of parties.

[15] Learned Counsel also submits that he had not been able to access the Nevis Land Development Ordinance and if he had had access to the Ordinance, the naming of the Respondents would have been different.

[16] Learned Counsel contends that he laid eyes on the Ordinance for the first time at the hearing of this matter and conceded that there was a failing on his part, but such a failing did not affect the substantive merits of the matter, since the Corporation was fully seized of the proceedings. Dr Dorset also contends that the currently named Respondents were the controlling arms and minds of the Corporation, and that Respondents were never at risk of a cost order being made against them as they were named in their capacity as members of the Corporation and not personally.

[17] Learned Counsel for the Claimant has filed the following authorities in support of his claim;

[3] MNIHCV2015/0002

- Edgecombe v Antigua Flight Training Center
- Quorum Island (BVI) Ltd v Virgin Islands Environmental Council
- Watson v Fernandes
- West v Shamrock Industries Ltd.
- Stoute v LTA Operations Ltd (trading as Lawn Tennis Association[4])

The Respond**ent's** submissions

[18] Learned Counsel for the Respondents Mr. Terrence Byron contends that it was the Applicant in his oral evidence on oath who stated that he doubted that there was a Board of the Nevis Housing and Land Development Corporation in place when the decision to terminate him was made. Therefore the Board could not have made the decision to terminate his services.

[19] Learned Counsel contends that the Applicant cannot rely on CPR 19.2 (5) while at the same time saying in his evidence that he had doubts that a Board was in place, and also stating in his written submissions that it is the decision of the Corporation that is being challenged.

[20] Mr. Byron also contends, and objects to paragraphs 2 and 3 of the Applicant's written submissions and submits that the Respondents have made false and misleading statements to the Court.

[21] Learned Counsel further contends that the Applicant has not submitted to the Court a draft of the proposed amendment to the pleadings consequential upon the proper substitution of parties and has not applied to the Court to amend the evidence sworn by the Claimant in support of these proceedings or any other part of the pleadings.

[4] [2014] EWCA Civ 657

[22] Mr. Byron submits that the Applicant offers no proposal about what is to happen to the six respondents who were joined to this suit, in light of the fact that they were protected from liability by statute and that the trial of this case is underway.

[23] Learned Counsel submits further that the Applicant has given the Court no good reason for waiting until the trial was underway to say he wanted to apply to substitute parties, and that the Court should not exercise its discretion in his favour and consequently dismiss the application.

[24] Learned Counsel for the Respondents has filed the following authorities in support of his submission.

a) The Queen on the application of River Thames Society, Lady Berkeley vs First Secretary of State et al [5]

b) The Queen on the application of Irene Johnson vs Secretary of State for Health [6]

c) Caribbean Development Consultants vs Gibson [7]

Issues

[25] Whether the Court should grant an application by the Applicant to substitute the Respondents as the proper parties in light of the wording of Section 3(4) the Nevis Land Development Ordinance Chapter 4.01 (N).

The Law

[26] Section 3 of the Nevis Land Development Ordinance states as follows;

3 (1) It is hereby established for the purposes of this Ordinance, a body to be called the Land Development Corporation which shall be a body corporate having perpetual

[5] [2006] AER (D) 105
[6] [2006] IWHC 288
[7] [2004] Jamaica SC42

succession and a common seal and having as its object the systematic development and management of land vested in the corporation.

(4) The Corporation may sue and be sued in its corporate name and may for all purposes be described by such name.

[27] CPR 19.2 (5)- provides as follows;

(5) 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 interest or liability has passed to the new party.

Rule 19.3 (1)

The Court may add, substitute or remove a party on or without an application.

Rule 19.7

If the Court makes an order for the addition or substitution of a new defendant and the Claim form is served on the defendant.

These Rules apply to the new Defendant as they apply to any other defendant.

Rule 20.1 (1)

A statement of case may be amended once without the Court's permission, at any time prior to the date fixed by the Court for the first case management conference unless the change is one to which-

a) Rule 19.4

b) Rule 20. 2 applies.

Rule 26. 9 (1)

General power of Court to rectify matters where there has been a procedural error.

1) This rule applies where the consequences of failure to comply with a rule, practice, discretion, court order or direction has not been specified by any rule, practise direction or court order.
2) An error of procedure or failure to comply with a rule, practise direction, court order or direction does not invalidate any step taken in the proceedings unless the Court so orders.
3) If there has been an error of procedure or failure to comply with a rule, practise direction, court order or direction, the Court may make an order to put matters right.
4) The Court may make such an order on or without an application by a party.

Section 56.2 of the CPR states as follows:

1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.
2) This includes-
    a) Any person who has been adversely affected by the decision which is the subject of the application;
    b) Any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);
    c) Any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
    d) Any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application;

e) Any statutory body where the subject matters falls within statutory limit; or

f) Any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.

Court's analysis and findings

[28] The first issue arising for determination is whether the Applicant can substitute the Respondents as the proper parties to this suit in light of Section 3 (4) of the Nevis Land Development Ordinance.

[29] Initially the Applicant applied for leave to apply for Judicial Review against 1. Alexis Jeffers, 2. Cardell Rawlins, 3. Leon Lescott, 4. Melissa Seabrookes, 5. Juletta Jeffers and 6. Dexter Boncamper. (The 1st-6th Respondents in their capacity as members of the N.H.L.D.C)

Leave was granted to the Applicant on the 1st May 2014 to make a claim for Judicial Review against the named Respondents.

However when the trial commenced on the 23rd February 2016, Counsel for the Respondents after cross-examination of the Applicant made submissions to the Court that the Respondents had been wrongly joined in the suit and was contrary to Section 4 (3) of the Nevis Land Development Ordinance.

[30] Further to this the Applicant has filed an Affidavit in the Court dated the 3rd March 2016 and changed the rubric without the permission of the Court and also substituted parties to the Claim without amending its statement of case or indicating the rule that was being referenced.

[31] In the case of Steele vs Mooney and others [8] the Court provided detailed discussion of "what is a procedural error" and referred to Rule 3.10 which is similar in nature to our CPR 2000 Rule 26.9. The Court at paragraph 23 of the Judgment states;

"Rule 3.10 gives the Court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly: Rule 1.1 (1). **If remedying one party's** error will cause Injustice to the other party, then the Court is unlikely to grant relief under the rule. This gives the Court the necessary control to ensure that the apparently wide scope of Rule 3.10 does not cause unfairness.

[32] It is common ground that there was an error of procedure in the present case but it is significant that there is disagreement as to how to characterise the error.

Dr Dorset submits that at the hearing of the application for judicial review and during cross-examination of the Applicant the Nevis Land Development Ordinance was shown to the Applicant which established the corporation as a body corporate which may sue and be sued in its own name.

Learned Counsel further submits that having had sight of the Ordinance for the first time, he made an oral application for substitution of parties and subsequently a written application was made.

[33] Mr. Byron characterises it differently. He submits that there was viva voce evidence from the Applicant Eustace Nisbett under cross-examination admitting that he could not say if or when any of the members of the Board of Directors was appointed.

[34] Learned Counsel also submits that the Applicant is in effect asking the Court to file an amended affidavit without proposing what will happen to the several affidavits already filed in these proceedings and the evidence already adduced.

[8] [2005] 1 WLR 2819

Mr. Byron contends that the Applicant cannot apply to substitute parties while not amending the statement of case.

[35] Mr. Byron also contends that the Applicant's reliance on Rule 26.9 is misplaced and would be manifestly unfair to the Respondents to attempt to bring a new case before the Court while a Trial is underway.

[36] The Issue in this case is a substitution of parties and I am convinced that Dr Dorset's interpretation of Rule 19.2 could not possibly be correct.

[37] In my opinion the Applicant was given leave to proceed to apply for Judicial Review against named Respondents and having recognized the error in the pleadings after reviewing the Nevis Land Development Ordinance he must now obtain leave to proceed against the proposed substituted party because naming persons who have no capacity to sue or be sued is outside the ambit of Section 19.2 (1).

[38] According to Sykes J in the case of Caribbean Development Consultants vs Gibson [9] ; "The House of Lords in Lazard Bros and Co. vs Midland Bank [1932] A 11 ER 571, held that as soon as it appears to the Court that a Judgment debtor did not exist at the date of the writ, then the Judgment obtained against the debtor is a nullity and must be set aside. The CPR have not affected such a fundamental rule, and it is still applicable today."

[39] In the case of International Bulk Shipping and Services vs. Minerals and Metals Trading Corp of India, the Court of Appeal per Evans J held that "there was nothing in the rules to suggest that any Court can breathe life into a nullity. If any of the parties are not legal persons, then the action must be stopped."

[40] The Court notes that the error in the pleadings was made by the Attorneys for the Applicant. They should have ensured and checked that the legislation under which they

[9] JM 2004 SC 42

were bringing this Application was correct. This is really basic preparation. The Respondents named were not just described incorrectly, they were not supposed to be named in the Application for Judicial Review.

[41] In my opinion, the error in the pleadings was not as to the name or identity of the persons to be sued, but as to the legal liability of the named Respondents. The error went to the capacity in which the Respondents were sued, not to their identity.

[42] The question for the Court's consideration is whether an order for substitution of parties can be made at this stage of the proceedings, and I refer to the Caribbean Court of Justice case of Sheer Mohamed et al vs S.A Nabi and sons Limited. [10] At paragraph 30 of the Judgment; the Court referred to order 14.4 of the Rules of the High Court of Trinidad and Tobago which provides as follows.

"No action shall be defeated by reason of the mis-joinder of parties, and the Court may in every action deal with the matter in controversy as far as regards the rights and interests of the parties actually before it. The Court or Judge may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court or Judge to be just, order that the names of any parties improperly joined whether as Plaintiffs or Respondents be struck out, and that the names of any parties, whether Plaintiffs or Defendants who out to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate upon and settle all the questions involved in the action."

[43] The Court concluded in the following terms; "Nonetheless, we do not think that we should make an order for substitution, unless we are convinced that such an order is necessary in order to avoid serious injustice."

[10] GY 2911 CCJ 2

[44] Again in another case emerging from the Caribbean Court of Justice of Gladston Watson vs Rosedale Fernandes [11] The learned Justices opined that;

"Courts exist to do Justice between the litigants through balancing the interests of an individual litigant against the interest 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."

[45] I adopt unreservedly the dicta of the learned Judges of the CCJ in the cited cases. However the technical procedural breach committed by learned counsel for the Applicant was an alarming revelation that he had NOT read the Ordinance under which he had purportedly brought his claim, although the claim had been littered with references to the Nevis Land Development Ordinance.

Conclusion

[46] Having reviewed the authorities and the submissions I find that in the circumstances, the Applicant's application to substitute parties is without merit and substance and the Court can find no grounds on which to exercise its discretion. In my considered opinion to remedy the Applicant's error is to cause Injustice to the Respondents, and the Court must ensure that there is necessary control and that the wide scope of the Rules does not cause unfairness.

[47] The correct procedure should be that the application for substitution of parties and the application for Judicial Review be discontinued, and that a new application and statement of claim be filed for leave for Judicial Review against the proper named party.

[11] CCJ Appeal No. CV2of 2006

[48] Unfortunately I am constrained to say that learned counsel Dr Dorset has misconstrued the rules and I therefore dismiss the application to substitute parties and grant costs to all of the Respondents to be assessed if not agreed upon pursuant to CPR 65.5.

[49] I thank Counsel on both sides for their helpful submissions in the matter.

Lorraine Williams

High Court Judge.