

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2014/0015

BETWEEN:

INDRA HARIPRASHAD-CHARLES

Appellant

and

THE BANK OF NOVA SCOTIA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

On Written Submissions:

Mr. Colin Foster for the Appellant
Mr. Gerard Williams for the Respondent

2015: March 5.

Interlocutory appeal – Ancillary claim – Appellant filed counterclaim with defence in court below – Counterclaim struck out by learned master on basis of failure to comply with rules 18.2(2) and 18.2(3) of Civil Procedure Rules 2000 – Whether defendant who files counterclaim with defence also required to file ancillary claim form in Form 9 of CPR 2000 – Whether counterclaim must be struck out by court for failure to attach certificate of truth to it

The respondent brought a claim against the appellant in the court below. In responding to the claim, the appellant included a counterclaim in her amended defence. The respondent made an application to strike out the counterclaim on the grounds that it was an abuse of process and it did not comply with the requirements of Part 8 of the Civil Procedure Rules 2000 (“CPR 2000”) since it failed to set out the appellant’s case. The appellant opposed the application.

The learned master who heard the application found that the appellant had complied with the requirements of Part 8, but had failed to comply with rules 18.2(2) and 18.2(3) of CPR

2000. She accordingly struck out the counterclaim on this basis. The learned master found that although a defendant may include a counterclaim at the end of a defence, since the counterclaim is an ancillary claim, it only commences with the filing of the ancillary claim form in Form 9 of CPR 2000. The learned master also found that the appellant's failure to provide an address for service and attach a certificate of truth in relation to the counterclaim was fatal. The appellant appealed the learned master's decision, contending that she erred in finding that it was necessary for her to file an ancillary claim form in Form 9 of CPR 2000. The appellant also argued that the master failed to recognise that a certificate of truth was filed at the end of the pleadings and that the appellant did provide an address for service.

Held: allowing the appeal; setting aside the order of the learned master; restoring the counterclaim; remitting the case to the High Court for further case management; ordering that the appellant furnish a certificate of truth in respect of the counterclaim within 7 days, failing which the counterclaim shall stand struck out; and ordering that the respondent pay the appellant's costs in the sum of \$1,000.00, that:

1. A counterclaim is an ancillary claim. Generally, an ancillary claim must be contained in or served with the ancillary claim form in Form 9 of CPR 2000. However, a defendant may file an ancillary claim by way of a counterclaim with the defence. When this is done, the ancillary claim is made when the counterclaim is filed. The appellant's ancillary claim in the present case was therefore properly before the court; there was no need for her to file an ancillary claim form in Form 9. The learned master therefore erred in striking out the counterclaim on the basis that the appellant had not filed the ancillary claim form in Form 9 of CPR 2000.
2. A counterclaim, being a separate claim, requires a certificate of truth in order to satisfy rule 3.12 of CPR 2000. Where a counterclaim is included in the same document as the defence, a single certificate of truth may be filed but it must make reference to both the defence and counterclaim. In the present case, the appellant's certificate of truth referred only to the defence. The appellant was therefore in breach of rule 3.12.
3. While the language of rule 3.12 of CPR 2000 is in mandatory terms, rule 3.13(1) gives the court a discretion whether or not to strike out any statement of case which has not been verified by a certificate of truth. The present case was not one in which no certificate of truth was filed. Rather, in making the certificate of truth, the appellant, instead of referring to both the defence and counterclaim, referred to just the defence. Rule 26.1(2) of CPR 2000 empowers the court to give directions or make orders for managing cases and furthering the overriding objective. Thus, it was open to the court to direct the appellant to correct the error, failing which the counterclaim would be struck out. In the circumstances, therefore, the striking out of the counterclaim was disproportionate.

JUDGMENT

[1] **THOM JA:** This is an appeal against the decision of the learned master in which she struck out the appellant's counterclaim on the basis that the appellant had failed to comply with the provisions of rules 18.2(2) and 18.2(3) of the **Civil Procedure Rules 2000** ("CPR 2000").

Background

[2] In response to a claim brought by the respondent, the appellant included a counterclaim in her amended defence.

[3] The respondent made an application to strike out the counterclaim on the grounds that the appellant's counterclaim was an abuse of process and it did not comply with the requirements of Part 8 of CPR 2000 since the appellant failed to set out her case. This application was opposed by the appellant.

[4] On hearing the application, the learned master found that the appellant had complied with the requirements of Part 8 but struck out the counterclaim on the grounds that the appellant had failed to comply with CPR 18.2(2) and CPR 18.2(3). The learned master found that although a defendant may include a counterclaim at the end of the defence, the counterclaim being an ancillary claim, it only commences with the filing of the ancillary claim form in Form 9.

[5] The learned master also found that the failure to provide an address for service and attach a certificate of truth in relation to the counterclaim was fatal.

[6] The issues raised on this appeal are:

- (i) Whether a defendant who files a counterclaim with a defence is also required to file an ancillary claim form in Form 9.
- (ii) Whether failure to attach a certificate of truth to a counterclaim must result in the counterclaim being struck out.

Issue No. 1

Whether Ancillary Claim Form Necessary

- [7] Mr. Foster, for the appellant, submitted that the learned master erred in finding that it was necessary for the appellant, who had included a counterclaim in her defence, to also file an ancillary claim form in Form 9. Mr. Foster relied on rule 18.4(1)(a) and submitted that it is not a condition precedent that an ancillary claim form be served with a counterclaim. An ancillary claim form is only required in the circumstances referred to in rule 18.4(1)(b). Learned counsel also relied on what he termed the historic practice in this jurisdiction of including the counterclaim at the end of the defence and he referred to 'Atkins Forms and Precedents'.
- [8] Mr. Williams, in response, submitted that the sole significance of rule 18.4(1) is that it outlines the circumstances in which leave of the court is required by a party who is desirous of making an ancillary claim. The rule is therefore not applicable to this case. However, rule 18.2(2) requires that the particulars of an ancillary claim must be contained in or served with the ancillary claim form in Form 9. Learned counsel relied on **Blackstone's Civil Practice 2004**¹ paragraphs 24.1 and 28.4 and submitted that a counterclaim being a separate claim, it must be set out in the same format and with the same particularity of a claim.

Discussion

- [9] The relevant provisions are rules 18.1(1), 18.2(1), 18.2(2), 18.4(1) and 18.4(7). They read as follows:

"18.1(1) An "**ancillary claim**" is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes a –

- (a) claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
- (b) claim by an ancillary defendant against any other person (whether or not already a party); and

¹ Blackstone's Civil Practice 2004 (5th edn., Oxford University Press 2004).

(c) counterclaim by a defendant against the claimant or against the claimant and some other person.”

“18.2(1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this rule.”

“18.2(2) Particulars of an ancillary claim must be contained in or served with the ancillary claim form in Form 9.”

“18.4(1) A defendant may make an ancillary claim (other than a claim falling within rule 18.3) without the court’s permission if in –
(a) the case of a counterclaim – it is filed with the defence; or
(b) any other case – the ancillary claim form is filed before the case management conference.”

“18.4(7) The ancillary claim is made in –
(a) the case of a counterclaim – when it is filed; and
(b) any other case – when the court issues the ancillary claim form.”

[10] The conjoint effect of the above rules is that a counterclaim is an ancillary claim. Generally an ancillary claim must be contained in or served with an ancillary claim form in Form 9. However a defendant may file an ancillary claim by way of a counterclaim with the defence. When this is done the ancillary claim is made when the counterclaim is filed.

[11] In the case at bar, the defendant filed her counterclaim with the defence. The ancillary claim of the defendant was therefore properly before the court. There was no need for her to file an ancillary claim form in Form 9. The learned master erred when she found that the counterclaim was not properly before the Court and as a result struck it out.

Issue No. 2

Rule 18.2(3)

[12] Rule 18.2(3) reads as follows:

“An ancillary claim form must include –
(a) the ancillary claimant’s address for service in accordance with rule 3.11; and
(b) a certificate of truth in accordance with rule 3.12.”

- [13] Mr. Foster contended that the learned master failed to recognise that a certificate of truth was filed at the end of the pleadings and the appellant did provide an address for service. Further, if there was an error, such error was not incurable since the learned master is empowered under rule 26.9(3) to make an order to put matters right.
- [14] Learned counsel further submitted that when a certificate of truth immediately follows a defence and counterclaim and where the counterclaim joins the complete defence to the counterclaim, a failure to insert a certificate of truth at the end of the defence does not make the defence and counterclaim defective. In finding the pleadings defective the learned master placed too much emphasis on form rather than substance, thereby failing to have regard to the overriding objective of the Rules which is to enable the court to deal with cases justly.²
- [15] Mr. Williams in response submitted that the language in CPR 18.2(3) is mandatory and therefore where there is a failure to comply with the provisions the only recourse open to the Court is to strike out the statement of case.

Discussion

- [16] It cannot be disputed that the appellant complied with the provisions of rule 18.2(3)(a). At the end of the amended defence and counterclaim the address for service is stated as 'Colin Foster's Chambers, Top Floor, 46 St. Louis Street, Castries'.
- [17] A careful reading of rule 18.2(3) shows that it requires an address for service and certificate of truth to be included in an ancillary claim form.
- [18] As stated earlier, an ancillary claim form was not filed; the counterclaim was included in the defence. Rule 3.12 to which rule 18.2(3) refers, requires every statement of case to be verified by a certificate of truth.

² See *Texan Management Limited and Others v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46.

[19] At the end of the counterclaim a certificate of truth was signed by Mr. Colin Foster, the legal practitioner for the appellant as follows:

“I COLIN FOSTER, certify that –

- a) The First Defendant believes that the facts stated in this Defence are true;
and
- b) This certificate is given on the First Defendant’s instructions.

The First Defendant cannot give the certificate because she is currently out of state.

Dated this 18th day of November 2010

(signed)
COLIN J. K. FOSTER
Legal Practitioner for the First Defendant”

[20] An examination of the certificate shows that it refers to the defence but makes no reference to the counterclaim.

[21] Rule 3.12 requires every statement of case to be verified by a certificate of truth. A counterclaim being a separate claim requires a certificate of truth. Where the counterclaim is included in the same document as the defence, a single certificate of truth may be filed but it must state ‘defence and counterclaim’. The failure to include ‘counterclaim’ in the certificate of truth was in breach of the rule.

[22] While I agree with Mr. Williams that the language of rule 3.12 is in mandatory terms, rule 3.13 gives the court a discretion whether or not to strike out any statement of case which has not been verified by a certificate of truth.

[23] Rule 26.9(3) does not assist the appellant, as contended by Mr. Foster. Rule 26.9(3) is only applicable where the case falls within rule 26.9(1) which empowers the court to put matters right where there are no consequences stipulated for an error of procedure or failure to comply with a rule, practice, direction or court order. Rule 3.13 provides consequences for failing to comply with Part 3.12. It reads:

“3.13(1) The court may strike out any statement of case which has not been verified by a certificate of truth.”

- [24] The learned master had a discretion pursuant to rule 3.13(1) whether or not to strike out the counterclaim for non-compliance with rule 3.12. In finding that she had no discretion in the matter and her only recourse was to strike out the counterclaim, the learned master erred.
- [25] Striking out of a statement of case has often been referred to as the court's nuclear option. This option should only be employed where the justice of the case requires it. Rule 3.13 having given the court a discretion whether or not to strike out, the court is required to consider whether there are other alternatives which could be employed to deal with the case justly.
- [26] This is not a case where no certificate of truth was filed. Rather, in making the certificate of truth, the defendant, instead of referring to both defence and counterclaim only referred to the defence. The provisions of rule 26.1 which deals with the court's general case management powers are very wide. In particular, rule 26.1(2) empowers the court to give directions or make orders for managing cases and furthering the overriding objective. An option that was open to the court was to give directions to the appellant to file the certificate within a specified time failing which the counterclaim would be struck out.
- [27] The striking out of the counterclaim by the learned master was disproportionate in all of the circumstances. Accordingly, the court makes the following orders:
- (1) The appeal is allowed.
 - (2) The order of the learned master is set aside.
 - (3) The counterclaim is restored.
 - (4) The appellant is to furnish a certificate of truth in respect of the counterclaim within 7 days, failing which the counterclaim shall stand struck out.

(5) The case is remitted to the High Court for further case management.

(6) The respondent shall pay the appellant's costs in the sum of \$1,000.00.

Gertel Thom
Justice of Appeal

I concur.

Janice M. Pereira
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal