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

**COMMONWEALTH OF DOMINICA**

**DOMHCVAP2014/0018**

**GLENWORTH O. N. EMANUEL**

Appellant

**and**

**STEPHEN K. M. ISIDORE**

Respondent

**Before:**

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| The Hon. Dame Janice M. Pereira, DBE | Chief Justice |
| The Hon. Mr. Davidson Kelvin Baptiste | Justice of Appeal |
| The Hon. Mde. Gertel Thom | Justice of Appeal |

**Appearances:**

Ms. Noelize N. Knight Didier for the Appellant
Ms. Heather F. Felix-Evans for the Respondent

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2015: August 11.

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*Interlocutory appeal – Ancillary claims made by both appellant and respondent against each other – No defence filed by respondent to appellant's ancillary claim – Appellant's application to strike out respondent's ancillary claim for contribution or indemnity dismissed by learned master – Whether learned master misconstrued appellant's ancillary claim – Whether learned master erred in exercise of her discretion in refusing to strike out respondent's ancillary claim*

The claimant in the court below (not a party to this appeal) instituted proceedings against the appellant, the respondent and the firm of Emanuel, Isidore and Associates LLP[1] for damages for breach of duty and/or professional negligence. In his statement of claim, the claimant alleged that he had retained the services of the appellant and respondent to institute proceedings against two individuals for damages for personal injury, loss and damage suffered as a result of a motor vehicle collision. He further alleged that the

[1] The law firm at which both the appellant and respondent practised at the material time.

appellant and respondent failed to institute the proceedings within the statutory limitation period, resulting in his claim being statute barred.

The appellant, following the filing of his defence to the above claim, made an ancillary claim against the respondent for full indemnity of any sum that he may be adjudged liable to pay the claimant, whether severally or jointly with the respondent. The respondent subsequently made an ancillary claim against the appellant for contribution and/or indemnity of any sums for which he may be found liable to the claimant. Following this, the appellant filed a defence to the respondent's ancillary claim. The respondent, however, did not file a defence to the appellant's ancillary claim. The appellant subsequently filed an application to strike out the respondent's ancillary claim. The learned master dismissed the appellant's application, having found that the issue of the parties' indemnity or contribution did not fall to be determined until the conclusion of the substantive claim and that striking out the respondent's ancillary claim for contribution or indemnity would deprive the court of the ability to determine the claim fairly and apportion liability based on the evidence.

The appellant appealed the learned master's decision. The two main issues raised on appeal were: (1) whether the learned master erred in construing the appellant's claim as one for contribution or indemnity rather than one for indemnity alone; and (2) whether the learned master erred in the exercise of her discretion in refusing to strike out the respondent's ancillary claim.

**Held:** allowing the appeal, setting aside the order of the learned master, striking out the ancillary claim of the respondent, and awarding costs to the appellant in the sum of $2,000.00, that:

1. Notwithstanding that the learned master stated in her decision that both the appellant and respondent 'filed actions for contribution or indemnity', when the decision is read as a whole, it is very clear that the learned master was well aware that the appellant's claim was one for indemnity only, and not contribution. She therefore did not misconstrue the appellant's claim. The learned master did, however, err in principle in finding that if the respondent's ancillary claim for contribution or indemnity was struck out, this would deprive the court of the ability to determine the claim fairly and to apportion liability based on the evidence. Whether the appellant or the respondent (or both of them) are held liable to the claimant and the extent to which each or both of them are held liable to the claimant, are not dependent on the determination of the ancillary claim of either the respondent or the appellant. Where the ancillary claim is a claim for contribution or indemnity, it only becomes relevant if liability is found on the underlying claim; the ancillary claim has no bearing on the outcome of the underlying claim. Accordingly, the learned master erred in the exercise of her discretion.

2. Pursuant to rule 18.12 of the Civil Procedure Rules 2000, where a party fails to file a defence to an ancillary claim, he is deemed to admit the ancillary claim.

Therefore, the respondent, having failed to file a defence to the appellant's ancillary claim against him, is deemed to have admitted the ancillary claim.

3. The learned master having erred in the exercise of her discretion, the appellate court is entitled to exercise its own discretion. Since the respondent has been deemed to have admitted that he is required to indemnify the appellant for any award that may be made against the appellant in the underlying claim, there can be no good reason for the respondent to be able to maintain a claim for indemnity or contribution against the appellant. The continuation of the respondent's ancillary claim would accordingly amount to an abuse of the process. While the striking out of a statement of case is a draconian step, where the continuation of the claim would amount to an abuse of process, the court should exercise its discretion and strike it out. Therefore, in the present case, the respondent's ancillary claim ought to be struck out.

**Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 applied; **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al** SLUHCVAP2003/0015 (delivered 24th November 2003, unreported) followed.

## JUDGMENT

[1] **THOM JA:** This is an appeal against the order of the learned master in which she dismissed the appellant's application to strike out the respondent's ancillary claim for contribution or indemnity against the appellant.

### Background

[2] The claimant, Mr. Albert George (who is not a party to this appeal), instituted proceedings against the appellant, the respondent and Emanuel, Isidore and Associates LLP (a law firm at which both the appellant and the respondent practised at the material time) for damages for breach of duty and/or professional negligence.[2]

[3] The claimant alleged in his statement of claim that he retained the services of the defendants to institute proceedings against Mr. Curvan Frederick and Mr. Joseph Frederick for damages for personal injury, loss and damage he suffered as a result of a motor vehicle collision which occurred on 21st July 2007. He further alleged

[2] In the court below, the respondent was the first defendant, and the appellant was the second defendant.

that the collision was caused by the negligence of Mr. Curvan Frederick while driving a vehicle owned by Mr. Joseph Frederick.

[4] Mr. George alleged further that the appellant and the respondent failed to institute the proceedings within the statutory limitation period resulting in his claim being statute barred.

[5] On 6th November 2013, following the filing of his defence to the claim, the appellant made an ancillary claim against the respondent for full indemnity of any sum that he may be adjudged liable to pay the claimant whether severally or jointly with the respondent. The ancillary claim was served on the respondent on 19th November 2013.

[6] On 3rd December 2013, the respondent made an ancillary claim against the appellant for contribution and or indemnity of any sums for which he may be found liable to the claimant.

[7] On 31st December 2013, the appellant filed a defence to the respondent's ancillary claim. However, the respondent did not file a defence to the appellant's ancillary claim.

[8] On 22nd May 2014, the appellant filed an application seeking an order that the respondent's ancillary claim be struck out.

[9] The learned master, in dismissing the appellant's application, outlined the following as her reasons for doing so:

> "(i) The claimant claims substantially the same relief from both defendants. They are jointly sued.
>
> (ii) Both the first and second defendants filed actions for contribution or indemnity for [sic] the other defendant.
>
> (iii) [The claimant's proceedings] can have a number of outcomes and may well result in a finding of liability against both or either of the defendants. The issue of their indemnity or contribution does not fall to be determined until the conclusion of the substantive claim.

> Although the failure of the first defendant to defend the second defendant's ancillary claim means that in any event the first defendant is wholly liable for a decision against first second [sic] or first and second defendant, dismissing the ancillary claim of the first defendant at this stage removes from the trial court its ability to fairly reason the claim and to apportion liability based on the facts and evidence. The trial judge can reason the effect if any of the claim of the first defendant, for a contribution or indemnity, and that in my view is where the continuing impact of that claim is to be decided."

**Grounds of Appeal**

[10] The appellant, in his notice of appeal, outlined several grounds of appeal. These grounds raise two issues. Firstly, whether the learned master misconstrued the appellant's ancillary claim. Secondly, whether the learned master erred in the exercise of her discretion in refusing to strike out the respondent's ancillary claim.

[11] Although the respondent filed a notice of opposition to the appeal, he did not file any written submissions as allowed for by rule 62.10(4) of the **Civil Procedure Rules 2000** ("CPR 2000").

**Issue No. 1**

[12] In relation to the first issue, the appellant contends that the learned master erred in construing his claim as one for contribution or indemnity rather than for indemnity alone. He argues that had the learned master construed his ancillary claim as one for full indemnity the learned master may have arrived at a different conclusion.

[13] It is trite law that a party may make a claim for indemnity or for contribution, or the claim may be made in the alternative for indemnity or contribution. It cannot be disputed that the appellant's ancillary claim is for indemnity only. In his notice of indemnity against the respondent he pleaded as follows:

> "The 2nd Defendant claims full indemnity against the 1st Defendant for any amounts that he is adjudged liable to pay (jointly or severally) to the Claimant, in this action."

[14] While the learned master in paragraph 5(ii) of her decision stated that both the appellant and the respondent claimed contribution or indemnity from the other, when the decision is read as a whole it is very clear that the learned master was well aware that the appellant's claim was one for indemnity only, and not contribution. This can be seen from the following findings made by the learned master in paragraphs 4 and 5:

> "4. … As it relates to the second defendant the issue of whether he is entitled to a contribution from the first defendant has been concluded by the first defendant's failure to file a defence to the second defendant's notice for an indemnity."
>
> 5.(iii) … Although the failure of the first defendant to defend the second defendant's ancillary claim means that in any event the first defendant is wholly liable for a decision against the first second [sic] or first and second defendant, …"

[15] I therefore find that the learned master did not misconstrue the appellant's claim.

**Issue no. 2**

[16] In relation to the second issue, the appellant contends that the respondent having failed to file a defence to the appellant's ancillary claim, he is deemed to have admitted the claim pursuant to CPR 18.12. Having deemed to have admitted the claim the respondent would be required to indemnify the appellant for any award of damages against him in the claim brought by the claimant. The appellant would not under any circumstances be required to contribute to any award made against the respondent. The learned master therefore erred in the exercise of her discretion when she refused to strike out the respondent's ancillary claim.

[17] The appellant further contends that since the issue raised by the respondent in his ancillary claim was his entitlement to a contribution or to be indemnified and this issue was determined when he was deemed to have admitted that he was liable to indemnify the appellant, the respondent's ancillary claim is barred by issue estoppel.

**Discussion**

[18] CPR Part 26.3(1) gives the court a discretion to strike out a statement of claim or part of a statement of claim in certain circumstances. It reads as follows:

> "(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
> (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

[19] The appellant's application to strike out relied on subparagraph (c).

[20] This being an appeal against the exercise of the learned master's discretion, it is well established that an appellate court will only interfere with the exercise of the discretion of a lower court if it is satisfied that the lower court erred in principle or took into consideration matters that should not have been taken into account, or failed to consider matters which should have been taken into account and as a result, exceeded the generous ambit within which reasonable disagreement is possible or the decision is plainly wrong.[3]

[21] Ancillary claims are dealt with in CPR Part 18. The general rule is that an ancillary claim is to be treated as a claim and the rules which apply to a claim apply to an ancillary claim save where special provisions are made or specific rules are stated to be inapplicable. The provisions which are not applicable are outlined in rules 18.2(4) and (5). They read as follows:

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[3] Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188; Stuart v Goldberg Linde (A Firm) and Another [2008] EWCA Civ 2; Enzo Addari v Edy Gay Addari BVIHCVAP2005/0021 (delivered 13th September 2005, unreported).

"(4) The following rules do not apply to ancillary claims –
(a) rules 8.12 and 8.13 (time within which a claim may be served);
(b) Part 12 (default judgments); and
(c) Part 14 (admissions) other than rule 14.1(1) and (2), 14.3 and 14.4

(5) If the ancillary claim is a counterclaim by the defendant against a claimant (with or without any other person) the claimant is not required to file an acknowledgement of service and therefore Part 9 (acknowledgement of service) does not apply to the claimant."

[22] Part 18 also makes special provisions for the filing of a defence to an ancillary claim and for the consequences in the event of failure to file a defence.

[23] Pursuant to rule 18.9, an ancillary defendant may file a defence to an ancillary claim. The period for filing the defence is 28 days after service of the ancillary claim. Where no defence is filed, rules 18.12(1) and (2 (a)) set out the consequences as follows:

"(1) This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.
(2) The party against whom the ancillary claim is made –
(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim;"

[24] In my opinion, rule 18.12 is very clear. Where a party fails to file a defence to an ancillary claim, he is deemed to admit the ancillary claim. In the same way that a party who is desirous of contesting a claim or a counterclaim is required to file a defence, an ancillary defendant is also required to file a defence within the time stipulated or seek an extension of time within which to do so.

[25] The provisions under the UK CPR are somewhat different to the provisions under rule 18.12. The UK equivalent to rule 18.12 is rule 20.11. These provisions do not apply to counterclaims or an ancillary claim for contribution or indemnity. Failure to file a defence does not result in the defendant being deemed to have admitted the ancillary claim. Rule 20.11 reads:

"Special provisions relating to default judgment on an additional claim other than a counterclaim or a contribution or indemnity notice.

20. 11

(1) This rule applies if –

(a) the additional claim is not –

(i) a counterclaim; or

(ii) a claim by a defendant for contribution or indemnity against another defendant under rule 20.6; and

(b) the party against whom an additional claim is made fails to file an acknowledgement of service or defence in respect of the additional claim.

(2) The party against whom the additional claim is made –

(a) is deemed to admit the additional claim, and is bound by any judgment or decision in the proceedings in so far as it is relevant to any matter arising in the additional claim;

(b) subject to paragraph (3), if default judgment under Part 12 is given against the additional claimant, the additional claimant may obtain judgment in respect of the additional claim by filing a request in the relevant practice form.

(3) An additional claimant may not enter judgment under paragraph (2)(b) without the court's permission if –

(a) he has not satisfied the default judgment which has been given against him; or

(b) he wishes to obtain judgment for any remedy other than a contribution or indemnity.

(4) An application for the court's permission under paragraph (3) may be made without notice unless the court directs otherwise.

(5) The court may at any time set aside or vary a judgment entered under paragraph (2)(b)."

[26] The learned master in her decision acknowledged that in the event that at the trial the court decides that the appellant is liable to the claimant, then the respondent would have to indemnify him. However, she proceeded to find that if the respondent's ancillary claim for contribution or indemnity was struck out this would deprive the court of the ability to determine the claim fairly and to apportion liability

based on the evidence. I am of the opinion that in so finding the learned master erred in principle.

[27] Whether the appellant or the respondent or both of them are held liable to the claimant and the extent to which either or both of them are held liable to the claimant are not dependent on the determination of the ancillary claim of either the respondent or the appellant. Where the ancillary claim is a claim for contribution or indemnity, the ancillary claim only becomes relevant if liability is found on the underlying claim. In other words an ancillary claim for contribution or indemnity has no bearing on the outcome of the claim brought against the defendants.

[28] The learned master having erred in the exercise of her discretion this Court is entitled to exercise its own discretion. This principle is stated by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Others**[4] as follows:

> "The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."[5]

[29] The question that arises is whether this Court should exercise its discretion and strike out the respondent's ancillary claim.

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[4] [1982] 1 All ER 1042.
[5] At 1046b.

[30] Striking out of proceedings has always been regarded as a draconian step and should be used sparingly and only when it is proportionate in all of the circumstances to do so.[6] In exercising its discretion the court is required to consider what is the appropriate relief having regard to the overriding objective of CPR 2000 which is to deal with cases justly. The court is required to consider whether there are other alternatives to striking out which would be just in the circumstances of the case.[7] In **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al**[8] Byron CJ stated the principle as follows:

> "The main concept in the overriding objective of the new rules set out in CPR Part 1.1, is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default. The flexible approach that should be adopted by the Court was discussed in the case of **Biguzzi v Rank Leisure**[3][*(1999) 1 WLR 1926*]. The Court has wide powers for imposing appropriate sanctions. It is therefore possible to formulate suitable sanctions for breach of rules and directions without immediately resorting to draconian responses such as striking out. I particularly mention the provisions relating to "unless orders" which are intended to be used as a preliminary step to the imposition of sanctions.
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> "There will be situations, however, where striking out without the intermediate step is an appropriate order. There are two relevant concepts in the overriding objective. One is saving the litigant's expense and the other allotting an appropriate share of the Court's resources. The ultimate solution would, therefore, be a proper exercise of discretion where failure to strike out would cause a waste of expenses and resources. This means that repeated non-compliance with a rule or non-compliance combined with a weak case would justify the striking out of the case."[9]

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[6] See: Citco Global Custody NV v Y2K Finance Inc (BVIHCVAP2008/0022 (delivered 19th October 2009, unreported)); Ian Peters v Robert George Spencer (ANUHCVAP2009/0016 (delivered 22nd December 2009, unreported)).

[7] See: Real Time Systems Limited v Renraw Investments Limited [2014] UKPC 6 and Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al (SLUHCVAP2003/0015 (delivered 24th November 2003, unreported)).

[8] SLUHCVAP2003/0015 (delivered 24th November 2003, unreported).

[9] At paras. 10 and 11.

[31] CPR 26.1(2)(w) gives the court very wide case management powers. These include giving any directions or making any orders for the purpose of managing the case and furthering the overriding objective of the Rules. In this case the respondent made no application for an extension of time to file a defence to the ancillary claim. In order for a court to extend the time by which some step may be taken by a party, there must be some material on which the court can exercise its discretion. In this case there is none.

[32] The respondent having been deemed to have admitted that he is required to indemnify the appellant for any award that may be made against the appellant in the underlying claim, there can be no good reason for the respondent to be able to maintain a claim for indemnity or contribution against the appellant. The continuation of the ancillary claim would amount to an abuse of the process. While as stated earlier striking out of a statement of case is a draconian step, where the continuation of the claim would amount to an abuse of process, the court should exercise its discretion and strike it out. This is such a case.

**Conclusion**

[33] For the reasons given above, I would allow this appeal, set aside the order of the learned master and strike out the ancillary claim of the respondent. The appellant shall have his costs in this appeal fixed in the sum of $2,000.00.

**Gertel Thom**
Justice of Appeal

I concur.

**Dame Janice M. Pereira, DBE**
Chief Justice

I concur.

**Davidson Kelvin Baptiste**
Justice of Appeal