

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

ANTIGUA AND BARBUDA

ANUHCVP2015/0022

BETWEEN:

MICHAEL LEWIS JUNIOR

1st Defendant

MICHAEL LEWIS SENIOR

Appellant/Applicant

and

TASHENA JAMES

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Paul A. Webster, QC

Justice of Appeal [Ag.]

The Hon. Mr. John Carrington, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Ralph Francis for the Applicant/Appellant

Ms. Andrea Smithen for the Respondent

2015: December 7;

Written reasons delivered: 13th January 2016.

Interlocutory appeal – Ancillary claim – Counterclaim against claimant – Failure to file and serve reply and defence to counterclaim within time – Construction and application of rule 18.12(2)(a) of the Civil Procedure Rules 2000 – Whether master had discretion to extend time for filing and serving reply and defence to counterclaim

The respondent, Ms. Tashena James (the claimant in the court below) filed a claim against Mr. Michael Lewis Junior and the appellant, Mr. Michael Lewis Senior (the defendants in the court below). Mr. Michael Lewis Senior filed a defence to the claim and counterclaimed against Ms. James. Ms. James filed a reply and defence to the counterclaim, but this was after the time permitted by the Civil Procedure Rules 2000 (“CPR 2000”) for doing so. About 6 weeks after that, at the first case management

conference,¹ the master allowed Ms. James an extension of time and deemed her reply and defence to counterclaim as being filed and served in time.

Mr. Michael Lewis Senior appealed against the master's order, contending that, under CPR 18.12(2)(a), he was entitled to judgment on his counterclaim as Ms. James was 'deemed to have admitted' his counterclaim, therefore, the master had no discretion to extend the time for filing and serving the reply and defence to counterclaim as the rule was mandatory.

Held: dismissing the appeal; and ordering that costs be costs in the cause below, that:

1. The 'deemed admission' under CPR 18.12(2)(a) is not intended to apply to the position where the main defendant in the proceedings has counterclaimed against the main claimant but applies rather to another party (who was not previously a party) joined to the main proceedings by way of a 'true' ancillary claim brought against that other party. Accordingly, in this case, it cannot be said that this placed the extension of time for filing and service of the reply and defence to counterclaim, being 'main proceedings' only as between Ms. James and Mr. Michael Lewis Senior, as being beyond the scope of the master's discretion as CPR 18.12(2)(a) would have been wholly inapplicable in the circumstances. In any event, the time limited for filing the defence to an ancillary claim, as a result of CPR 18.9(3), also includes such time as is extended or agreed pursuant to CPR 10.3. Therefore, even if the case involved a third party ancillary defendant, the master would have had jurisdiction to extend time for filing a defence to the ancillary claim.

REASONS FOR DECISION

[1] **PEREIRA CJ:** On 7th December 2015, the Court, with the consent of the parties, treated the application for leave to appeal as the hearing of the appeal as it raised, in the main, an issue of construction and application of a rule in Part 18 of the **Civil Procedure Rules 2000** ("CPR 2000") relating to ancillary claims. The Court dismissed the appeal with costs to be costs in the cause below. These written reasons have been formulated with full input from all members of the panel.

[2] The circumstances giving rise to this issue may be shortly stated as follows:

- (a) The respondent, Ms. Tashena James, issued a claim in negligence for damages against Mr. Michael Lewis Junior and the

¹ The case management conference was not attended by Mr. Michael Lewis Junior and Mr. Michael Lewis Senior due to a mistaken view of the date fixed.

appellant, Mr. Michael Lewis Senior (the defendants in the court below).

- (b) Mr. Michael Lewis Senior (second defendant below) filed a defence and counterclaimed against Ms. James (claimant) asserting negligence on her part.
- (c) Ms. James filed a reply and defence to counterclaim but this was after the time allowed by CPR 2000 for so doing.
- (d) At the first case management conference occurring about six weeks thereafter, which was not attended by Mr. Michael Lewis Junior and Mr. Michael Lewis Senior (due to a mistaken view of the date fixed), the master allowed Ms. James an extension of time and deemed the reply and defence to counterclaim to be timeously filed and served. This order was not served on Mr. Michael Lewis Junior and Mr. Michael Lewis Senior until 26th May 2015.
- (e) Mr. Michael Lewis Senior appealed contending that he was entitled under CPR 18.12(2)(a) to judgment on his counterclaim as Ms. James was 'deemed to have admitted' his counterclaim and thus the master had no discretion to extend time for filing and serving the reply and defence to counterclaim as the provision of CPR 18.12(2)(a) was mandatory.

[3] As pointed out during the hearing, there is accorded to a master a plenitude of case management powers under Part 26 of CPR 2000. Among them is the power to extend or abridge time as fixed by a rule for the taking of a step in the proceedings unless the rule expresses otherwise. More fundamentally however, is that the purport of CPR 18.12(2)(a) has been misunderstood as it relates to ancillary claims – that is, another party against whom a claim has been made, but

who is not or was not a party to the main proceedings. This may be partly as a result of the fact that, unlike the old rules governing procedure before the advent of CPR 2000, a counterclaim made by a defendant against a claimant is now included in the definition of 'ancillary claim'. CPR Part 18.1(1) defines an 'ancillary claim' as:

“...any claim other than a claim by a claimant against a defendant or a claim for set off contained in a defence and includes a –

(a) ...

(b) ...

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

[4] CPR 18.2(4) expressly dis-applies Part 12 of CPR 2000 (default judgments) to ancillary claims. This would seem to suggest that a counterclaimant/ancillary claimant may not obtain default judgment on his counterclaim where a claimant/ancillary defendant fails to file a defence to the counterclaim/ancillary claim.

[5] CPR 18.12 is headed: 'Special provisions relating to judgment on failure to file defence to ancillary claim'. Sub-rule (2) then goes on to state as follows:

“The party against whom the ancillary claim is made –

(a) is deemed to admit the ancillary claim, **and is bound by any judgment ... in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim.**” (Emphasis added).

[6] The emphasized portion of this sub-rule makes clear that an ancillary defendant would be bound by any judgment obtained in the main proceedings. Read literally, in the context of a claim only as between a claimant and a defendant as is the case here, this would suggest that where the defendant has counterclaimed against the claimant, the claimant, who is to be treated as the ancillary defendant, is to be treated as being bound by his own judgment (even perhaps a default judgment) which may have been obtained against the defendant/ancillary claimant as may be relevant to the ancillary claim. But this literal reading, apart from being circular, would be somewhat nonsensical where the judgment is in favour of and

benefits the claimant only. It would seem odd to speak of the claimant (who for the purpose of CPR 18.12(2)(a) is the ancillary defendant) as being bound by a judgment in the 'main proceedings' in so far as is relevant to the ancillary claim, in as much as the ancillary defendant is in fact the claimant in the 'main proceedings' which can only be a reference to the proceedings as between the claimant and the defendant.

- [7] This leads us to conclude that were the sub-rule to be construed in this way, it would lead to an absurd result. Rather, it is not contemplated that this sub-rule is to govern the effect of a failure to file a defence as it relates to a claimant and defendant in the main proceedings but is more practically and properly directed to the situation where there is an ancillary defendant in the true sense – that is another party against whom a claim has been made, but who is or was not a party to the main proceedings. It is this true ancillary defendant who would be considered, having failed to file a defence to the defendant's ancillary claim, as being bound by a judgment in the main proceedings. This can readily be seen to be the case where the defendant makes a claim for indemnity or contribution against another person who becomes an ancillary defendant by virtue of the main defendant's claim against him. Where that person fails to defend that claim for indemnity or contribution, it then follows that a judgment in favour of the main claimant against the main defendant would also bind that true ancillary defendant. This is also consistent with sub-rule (5) which says in effect that the ancillary claimant (the main defendant) may not enter judgment against an ancillary defendant (i.e. the true ancillary defendant as distinct from the main claimant) for any remedy other than a contribution or indemnity for a sum in excess of the judgment sum entered against the ancillary claimant (main defendant).² The judgment being referred would be the judgment obtained in favour of the main claimant against the main defendant.

² See CPR 18.12(5).

- [8] Following this reasoning, the 'deemed admission' under CPR 18.12(2)(a) is not intended to apply to the position as between the main claimant and main defendant but rather to another party (who was not previously a party) joined to the main proceedings by way of a true ancillary claim brought against that other party. As such, it cannot be said that this placed the extension of time for filing and service of the reply and defence to counterclaim, being 'main proceedings' only as between the claimant (Ms. James) and the second defendant (Mr. Michael Lewis Senior), as being beyond the scope of the master's discretion as CPR 18.12(2)(a) would have been wholly inapplicable in the circumstances. In any event, the time limited for filing the defence to an ancillary claim, as a result of CPR 18.9(3), also includes such time as is extended or agreed pursuant to CPR 10.3. Therefore, even if the case involved a third party ancillary defendant, the master would have had jurisdiction to extend time for filing a defence to the ancillary claim.
- [9] Mr. Michael Lewis Senior had no issue with the exercise of the master's discretion once it was determined that he had such a discretion.
- [10] The Court accepts that the provisions in this part of CPR 2000 may not admit of straight forward interpretation and application and may benefit from some refinement. In the circumstances, in dismissing the appeal, costs were ordered to be costs in the cause below.