EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2014/0024

BETWEEN:

[1] DR. MARTIN G.C. DIDIER
[2] DR. KANNAN MATHIPRAKASAM
[3] DR. GURUSWAMY RAMACHANDRAPPA

Appellants

and

ROYAL CARIBBEAN CRUISES LTD.

Respondent

CONSOLIDATED WITH

SLUHCVAP2015/0004

BETWEEN:

ROYAL CARIBBEAN CRUISES LTD

Appellant

and

[1] MEDICAL ASSOCIATES LTD
[2] DR. MARTIN C DIDIER
[3] DR. KANNAN MATHIPRAKASAM
[4] DR. GURUSWAMY RAMACHANDRAPPA

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Geoffrey DuBoulay, with him, Ms. Sardia Cenac-Prospere for the Appellants in appeal SLUHCVAP2014/0024 (the 2nd - 4th Respondents in appeal SLUHCVAP2015/0004)

Mr. Dexter Theodore for the Respondent in appeal SLUHCVAP2014/0024 (the Appellant in appeal SLUHCVAP2015/0004)

2016: February 10;
June 6.

Interlocutory appeal – Civil appeal – Medical negligence – Striking out pursuant to CPR 26.3(1)(b) – Summary judgment pursuant to CPR Part 15 – Contract – Agency – Tort – Duty of care owed to medical patient – Whether claim brought by respondent was statute barred – Interpretation of articles 2121(7) and 2122 of Civil Code – Indemnity – Contribution – Whether RCC was joint tortfeasor for purpose of claiming contribution pursuant to article 989C(1)(c) of Civil Code – Legal test for striking out statement of case or part of it – Legal test for summary judgment – Whether legal tests for striking out and summary judgment distinct and separate

Mr. Paul Sterling was an employee of Royal Caribbean Cruises Ltd. ("RCC") who worked aboard the cruise ship "Explorer of the Seas". One day, Mr. Sterling suddenly fell seriously ill while on the ship. He was taken off the vessel on 3rd April 2010 while it was docked in Saint Lucia in order to receive treatment at one of the local hospitals, known as Tapion Hospital. Tapion Hospital is owned, managed and administered by the first respondent in appeal SLUHCVAP2015/0004, Medical Associates Ltd. A company called Platinum Port Agency Incorporated ("Platinum") handled the necessary arrangements for transporting Mr. Sterling to the hospital. Platinum formally indicated to Medical Associates Ltd., by way of letter, that it would be responsible for settling the medical charges incurred in treating Mr. Sterling at the hospital. Mr. Sterling was brought to Tapion Hospital and given medical treatment there. However, when his condition was observed post-treatment by doctors at the hospital, it was advised that he be airlifted out of Saint Lucia to receive further medical care elsewhere. By this point, Mr. Sterling was in a very poor state of health. He was air evacuated to a hospital in the United States.

RCC instituted proceedings against Medical Associates Ltd. in December 2012, alleging that Mr. Sterling had suffered 'respiratory failure with severe hypoxia and/or hypoxemia and/or hypotension and/or preventable hypoxic encephalopathy' as a result of the treatment which he had received at Tapion Hospital. RCC further stated in its claim that Mr. Sterling will require ongoing clinical healthcare and nursing for the rest of his life and will be incapable of performing normal, healthy, adult functions. RCC alleged that Mr. Sterling (by his lawful representatives) sought damages from it (RCC) arising out of the medical treatment received by Mr. Sterling while he was in Saint Lucia and that after various negotiations the parties were able to agree on a final settlement in the amount of

US$5,750,000.00. This sum was inclusive of loss of earnings, past and present pain suffering and all potential claims by Mr. Sterling or his estate. RCC sought to recover the sums which it had paid out to Medical Associates Ltd. through the commencement of the local proceedings. RCC alleged that the medical treatment received by Mr. Sterling at Tapion Hospital was substantially below the required and/or proper and/or reasonable standard of care.

An amended claim form and statement of claim were filed by RCC on 25th June 2013 which added to the claim, as defendants, four doctors who had attended to Mr. Sterling at Tapion Hospital in April 2010. Three of these added defendants are the appellants in appeal SLUHCVAP2014/0024 ("the Doctors"). RCC sought relief under four separate heads: i) contract; ii) tort; iii) indemnity and/or contribution and/or restitution pursuant to US law provisions and article 989C(1)(c) of the Civil Code;[1] and iv) contribution at common law. On 13th May 2014, the Doctors made an application to have RCC's claim 'struck out and/or dismissed' with costs and in the alternative, security for costs of the proceedings. The application was brought pursuant to rules 15.2, 26.3(1)(b), 24.3(1)(f) and 24.3(1)(g) of the Civil Procedure Rules 2000 ("CPR"). Rules 15.2 and 26.3(1)(b) deal with summary judgment and striking out a statement of case respectively, while Part 24 of CPR deals with security for costs. The main ground of the application (which was further particularised) stated that RCC's claim against the Doctors 'does not disclose any reasonable ground for bringing the claim and/or has no reasonable prospect of success'. The Doctors challenged RCC's claim under all heads apart from contribution at common law. In particular, in relation to the claim in tort, the Doctors contended that this claim was statute barred on the basis that it fell to be considered under article 2122 of the Civil Code rather than article 2121(7) of the Civil Code.

The learned master found that RCC's claim did disclose a cause of action in contract. She held that whether there existed a course of dealings between Platinum and Medical Associates Ltd. (as had been pleaded by RCC), with the Platinum acting as agent for RCC, was a matter for trial following the assessment of all evidence advanced and a determination of whether RCC was a reasonably contemplated party to the contract. She found however that RCC's claim did not disclose a cause of action in tort, nor in indemnity and/or contribution and/or restitution (pursuant to US law provisions and article 989C(1)(c)). Accordingly, she refused to strike out or dismiss the contractual claim, but struck out the tort and indemnity/contribution/restitution claims from the pleadings. Her basis for striking out the claim in tort however was not that it was prescribed as the Doctors had alleged – she found that article 2121(7) was applicable in the circumstances and so RCC's claim had been brought in time. Both the Doctors and RCC appealed the learned master's decision. The Doctors challenged, by way of appeal, the learned master's finding

[1] Cap. 4.01, Revised Laws of Saint Lucia 2008.

that RCC's claim in tort is not prescribed, based on her construction of article 2121(7). They contended that the learned master erred in her interpretation of the article. The Doctors also challenged, by way of counter notice, the learned master's reasoning and findings on the issue of whether RCC was a joint tortfeasor liable for the purposes of claiming contribution under article 989C(1)(c) of the Civil Code, as well as the basis of the learned master's decision on the contribution/indemnity claim at common law. RCC, on the other hand, complained that the learned master ought not to have struck out its claim in tort, as well as its claim for indemnity/contribution/restitution based on US law and article 989C(1)(c). RCC argued (among other things) that the learned master erred as to the proper test to be applied and/or the application of such test in relation to the striking out of a case at a preliminary stage. RCC further argued that the learned master erred in failing to allow for the fact that the matter is at a preliminary stage (prior to disclosure of documents, exchange of witness statements and expert evidence) and therefore the evidence before the court was necessarily far from complete.

Held: dismissing the Doctors' appeal but allowing their counter notice of appeal, and allowing RCC's appeal in part; setting aside the decision of the learned master striking out RCC's claim in tort so that it may proceed to trial; striking out RCC's claim in indemnity and/or contribution and/or restitution (pursuant to US law provisions and article 989C(1)(c) of the Civil Code); ordering that RCC's claim in contribution/indemnity at common law be allowed to proceed to trial; and ordering that costs be costs in the cause in the matter below, that:

1. The legal tests for entering summary judgment pursuant to CPR 15.2 and striking out a party's statement of case pursuant to CPR 26.3(1)(b) are not the same and should not be confused with each other. The summary judgment and strike out procedures are distinct – they have different procedural requirements, are used in different circumstances and have different legal consequences. In particular, the two cannot operate simultaneously. In disposing of a claim using the Part 15 summary judgment procedure, the legal issues in the case are considered by the court and then it is determined, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim. A judgment entered on a summary judgment application is a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court. On the other hand, an application for a party's statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties' pleaded cases before it. All facts pleaded in the statement of case are assumed to be true for this purpose and no additional evidence is adduced. If the court finds that the pleadings are untenable as a matter of law and disclose no reasonable ground for bringing or defending the claim, then the statement of case may be

struck out. Striking out, however, does not produce a judgment on the merits and a party whose claim is struck out is not precluded from remedying its faults and bringing further legal proceedings in relation to the same dispute.

Citco Global Custody NV v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) followed; **Robert Edward Jones v Her Majesty's** Attorney-General sued on behalf of New Zealand Police [2003] UKPC 48 applied; Swain v Hillman and Another [2001] 1 All ER 91 cited.

2. A party's statement of case should not be struck out where the argument between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated. The jurisdiction to strike out should be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information. It should also be taken into account that the examination and cross-examination of witnesses often change the complexion of a case.

   Citco Global Custody NV v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) followed.

3. Concerning RCC's tort claim, the mere fact that it was at least arguable which article of the Civil Code applied for the purposes of limitation should have been an indication to the learned master that the claim ought to have been allowed to proceed to trial and that it was neither suitable for striking out nor for the entry of summary judgment. This argument clearly involved a substantial point of law which did not admit of a plain and obvious answer. The learned master accordingly erred in proceeding to make a determination on this issue in order to decide whether the claim in tort ought to be struck out or not. This was an error in principle made by the learned master.

4. The law has territorial effect. It does not operate extra territorially. In order to claim contribution under article 989C(1)(c) of the Civil Code, the claimant must be a joint tortfeasor liable and not merely by virtue of a foreign law provision. Liability must be established in Saint Lucia, which is the jurisdiction within which article 989C(1)(c) operates. Nowhere in its pleadings did RCC make a positive assertion that it was a joint tortfeasor liable. In particular, this must not be left to an inference, but it must be an express averment. Accordingly, RCC's claim in contribution under article 989C(1)(c) of the Civil Code is not made out and is rightly struck out, although not for the reasons given by the learned master.

Fourth Transoceanic Shipping Co. Ltd. v Dr. Raymond Smith Appellate Jurisdiction 1996 No. 395 (Bermuda, unreported) applied; Stott v West Yorkshire Road Car Co. Ltd. and Another [1971] 2 QB 651 applied.

5. No challenge having been made in the court below to RCC's contribution/indemnity claim at common law, it would not have been appropriate for any aspects of this claim to be addressed on appeal.

JUDGMENT

[1] PEREIRA CJ: These consolidated appeals arise out of a claim brought by Royal Caribbean Cruises Ltd. ("RCC") in December 2012 against Medical Associates Ltd. in relation to medical care received by one of RCC's employees at Tapion Hospital in Saint Lucia in April 2010. The two appeals, SLUHCVAP2014/0024 and SLUHCVAP2015/0004 were consolidated by an order of this Court dated 13th April 2015.

Background to the Appeals

[2] A rather unfortunate series of events led up to the filing of the underlying claim in the present proceedings. It all began when Mr. Paul Sterling, an employee aboard RCC's cruise ship "Explorer of the Seas", began to feel very ill aboard the ship. While the vessel was docked in Saint Lucia at the beginning of April 2010, Mr. Sterling was taken off the ship to receive medical treatment at Tapion Hospital. Tapion Hospital is owned, managed and administered by the first respondent in appeal SLUHCVAP2015/0004, Medical Associates Ltd.

[3] A company called Platinum Port Agency Incorporated ("Platinum") handled the necessary arrangements for getting Mr. Sterling to the hospital and also formally indicated to Medical Associates Ltd., by way of letter, that it would be responsible for settling medical charges incurred in treating Mr. Sterling at the hospital.

[4] Mr. Sterling was brought to Tapion Hospital on 3rd April 2010 and given treatment there. However, when doctors at the hospital observed Mr. Sterling's condition post-treatment, they advised that he be airlifted out of Saint Lucia to receive further medical care elsewhere. By this point, Mr. Sterling was in a pretty poor state of health. He was air evacuated to the United States in order for him to receive further, long-term treatment. RCC stated in its claim that Mr. Sterling had suffered 'respiratory failure with severe hypoxia and/or hypoxemia and/or hypotension and/or preventable hypoxic encephalopathy' and that this was as a result of the treatment which he had received at Tapion Hospital. RCC further stated that Mr. Sterling will require ongoing clinical healthcare and nursing for the rest of his life and will be incapable of performing normal, healthy, adult functions.

[5] RCC claimed that Mr. Sterling (by his lawful representatives) sought damages from RCC, arising out of the medical treatment received by Mr. Sterling while he was in Saint Lucia, which medical treatment had been arranged by RCC. RCC alleged that its Director of Litigation received a letter of claim from the legal representative of Mr. Sterling demanding the sum of US$15,000,000.00 in damages. However, after various negotiations, the parties were able to agree on a final settlement in the amount of US$5,750,000.00. This sum was inclusive of loss of earnings, past and present pain and suffering and all potential claims by Mr. Sterling or his estate. RCC subsequently commenced the instant proceedings in the High Court to recover the sums which it had paid out to Mr. Sterling. It alleged that the medical treatment received by Mr. Sterling at Tapion Hospital was substantially below the required and/or proper and/or reasonable standard of care and accordingly, those responsible for administering treatment to him at the hospital were liable for the damage which he suffered.

[6] Following the initial filing of the claim in December 2012 against Medical Associates Ltd. only, RCC filed an amended claim form and statement of claim on 25th June 2013 which (among other things) added four defendants to the claim, these being doctors who had attended to Mr. Sterling at Tapion Hospital in April

2010. For the purposes of this judgment, I shall collectively refer to the three appellants in appeal SLUHCVAP2014/0024, who were three of the four added defendants in the amended claim, as "the Doctors".

[7] In the court below, RCC sought relief under the following four separate heads:

(a) Contract – RCC alleged that a cause of action had arisen in contract by virtue of a course of dealing (since the year 2005) between Platinum and Medical Associates Ltd. It claimed that Platinum was acting as its agent in dealing with Medical Associates Ltd., and that this accordingly gave rise to a contractual relationship between RCC (as principal) and Medical Associates Ltd. (a third party). RCC alleged that it was an implied term of the contract between it and Medical Associates Ltd. that Medical Associates Ltd. would exercise proper and reasonable skill and care in the provision of medical services to Mr. Sterling and that this term of the contract was breached when the treatment which Mr. Sterling received at Tapion Hospital resulted in his condition deteriorating dramatically and complications arising;

(b) Tort – RCC alleged that Medical Associates Ltd. owed RCC a duty of care in relation to the treatment of Mr. Sterling and that this duty of care was breached as a result of the negligence of Medical Associates Ltd. and the Doctors;

(c) Indemnity and/or Contribution and/or Restitution pursuant to US law provisions (in particular, the Jones Act) and article 989C(1)(c) of the Civil Code[2] – RCC alleged that it was compelled by (US) law to pay money in settlement of Mr. Sterling's claim based on US law provisions (statute as well as case law) and that this was money which Medical Associates Ltd. and the Doctors would have been liable to pay. Accordingly, it claims an indemnity and/or contribution and/or restitution from them. Alternatively, RCC averred that it, along with Medical Associates Ltd. and the Doctors, were joint tortfeasors in

[2] Cap. 4.01, Revised Laws of Saint Lucia 2008.

relation to the condition of Mr. Sterling, and accordingly it is entitled to claim a contribution from them pursuant to article 989C(1)(c) of the Civil Code.

(d) Contribution at common law – RCC claimed that a right of contribution from each of Medical Associates Ltd. and the Doctors arose from the right of contribution conferred by the laws of the United States of America, this being a right in restitution arising in accordance with the laws of the country in which the liability was settled.

[8] By notice of application dated 13th May 2014 and made pursuant to rules 15.2, 26.3(1)(b), 24.3(1)(f), and 24.3(1)(g) of the Civil Procedure Rules 2000 ("CPR"), the Doctors sought (among other things) to have RCC's claim 'struck out and/or dismissed' with costs. In the alternative, they sought security for costs of the proceedings. The grounds of the application to strike out and/or dismiss the claim were set out as follows in their application:

> "2.1 The Claimant's [RCC's] claim against the Defendants/Applicants [the Doctors] does not disclose any reasonable ground for bringing the claim and/or has no reasonable prospect of success in that:
>
> 2.1.1 the Defendants/Applicants did not contract with the Claimant so that there is no cause and/or right of action by the Claimant against the Defendants/Applicants; and
>
> 2.1.2 the Defendants/Applicants did not owe a duty of care to the Claimant;
>
> 2.1.3 the claim against the Defendants/Applicants in tort/negligence is prescribed;

Decision of the Learned Master

[9] The Doctors' application was heard by the learned master on 2nd and 3rd August 2014. When the matter was heard on these dates the only application which the master had before her was the one which was filed by the Doctors on 13th May 2014. However, the Doctors proceeded to file an amended application on 4th August 2014 which raised the question of RCC not being a tortfeasor liable under Saint Lucia domestic law for the purposes of claiming contribution pursuant article 989C(1)(c) of the Civil Code, and also the question of whether RCC had a cause of action against the Doctors by virtue of any rights conferred by the laws of

the United States. Notwithstanding that the amended application was filed only after the hearing, the learned master clearly had regard to these additional grounds which it raised.

[10] The learned master stated that there were 5 issues for consideration, the first of these being 'whether the 2, 3 and 4th Defendants [the Doctors] are entitled to have the claim struck out or otherwise have summary judgment of the claim on the basis that it does not disclose a cause of action against them in contract'; the second was whether any cause of action in tort was time barred; the third, whether the Doctors are entitled to have the claim struck out or otherwise obtain summary judgment of the claim on the basis that it otherwise does not disclose a cause of action in tort against them; the fourth, whether RCC is entitled to an indemnity based on an agreement reached with Mr. Sterling and his representatives in settlement of the proceedings in the US; and fifthly, whether the Doctors are entitled to security for costs. The learned master went on to state that the Doctors 'invite the court to strike out the claim or enter summary judgment' in their favour, if having considered the first four issues, it finds the challenges raised to be meritorious.

[11] The learned master then stated that the applicable authorities from the OECS jurisdiction support the principle that the striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases so as not to deprive a party of the right to a trial and to strengthen their case, through the processes of disclosure and other procedures such as requests for further information. She further stated that exceptional circumstances were described in the case of Tawney Assets Ltd v East Pine Management et al.[3] Then at paragraph 7 of her judgment she stated as follows:

> "The approach of our courts in general terms has been to apply its discretion to strike out a statement of case in exceptional cases or where it is bound to fail or where it is plain and obvious that it cannot succeed. Additionally under CPR 2000 Part 15, a court may exercise summary

[3] BVIHCVAP2012/0007 (delivered 17th September 2012, unreported).

judgment of a statement of case if the pleadings, affidavits and other evidence and admissions disclose that the case is unsustainable."

[12] Concerning the first issue (relating to the viability of the contract claim), the learned master held at paragraph 19 of her judgment that whether there is a finding of contractual liability or not on the part of the Doctors, and whether there existed a course of dealings is a matter for trial following the assessment of all the evidence advanced and a determination of whether RCC was a reasonably contemplated party to the contract. Accordingly, having applied the legal test for striking out to this part of RCC's claim, the learned master stated that she was satisfied that RCC's claim does disclose a cause of action in contract as against the Doctors.

[13] With regard to the second and third issues (relating to the limitation period and viability of the tort claim), the learned master held that although RCC's claim in tort was not time barred on the basis that this claim fell to be considered under article 2121(7) of the Civil Code (which provides for a limitation period of 6 years), rather than under article 2122 (which provides for a limitation period of only 3 years), from the pleadings filed and the affidavit evidence before her, there was nothing to suggest a relationship of proximity between RCC and the Doctors that would give rise to a duty of care. She therefore went on to hold that the claim discloses no reasonable basis for suing the Doctors in negligence, and accordingly, struck out this averment from the pleadings.

[14] Concerning the fourth issue (relating to contribution/indemnity), the learned master stated that the question is whether RCC, who is entitled under US law to a contribution from joint tortfeasors, is able on its pleadings to sustain a case for contribution in this jurisdiction from the Doctors who have not been sued in tort, by Mr. Sterling. She then arrived at the conclusion that RCC is not a tortfeasor liable and ultimately held that a claim for contribution and/or indemnity (on this basis) was unsustainable and accordingly struck it out.

[15] The Doctors as well as RCC appealed the learned master's decision. It was decided, by the same order of 13th April 2015 which consolidated the two appeals, that the Doctors would be treated as appellants, and RCC as the respondent for the purpose of both appeals. The Doctors challenged, by way of appeal, the learned master's finding that RCC's claim in tort is not prescribed, based on her construction of article 2121(7) of the Civil Code. They contended that the learned master erred in her interpretation of article 2121(7), and in concluding that this article is drafted in sufficiently wide terms that an action in negligence against a medical practitioner is not excluded from its confines, and thus such a claim is prescribed by 6 years, rather than by 3 years under article 2122(2) of the Civil Code. The Doctors also challenged, by way of counter notice, the learned master's reasoning and findings on the issue of whether RCC was a joint tortfeasor liable for the purposes of claiming contribution under article 989C(1)(c) of the Civil Code, as well as the basis of the learned master's decision on the contribution/indemnity claim at common law. RCC, on the other hand, complained that the learned master ought not to have struck out its claim in negligence, as well as its claim for indemnity based on US law and article 989C(1)(c) of the Civil Code. RCC argued (among other things) that the learned master erred as to the proper test to be applied and/or the application of such test in relation to the striking out of a case at a preliminary stage. RCC further argued that the learned master erred in failing to allow for the fact that the matter is at a preliminary stage (prior to disclosure of documents, exchange of witness statements and expert evidence) and therefore the evidence before the court was necessarily far from complete.

[16] No challenge was made in the court below to RCC's contribution/indemnity claim at common law. Only the contract claim, the tort claim, and the contribution/indemnity claim made pursuant to US law provisions and article 989C(1)(c) of the Civil Code were challenged. Notwithstanding this, the Doctors invited this Court to address aspects of RCC's common law contribution/indemnity claim in this appeal. We declined to do so however, on the basis that these were

not matters raised in the application before the learned master and accordingly, addressing them in this appeal would have been inappropriate save to say that since this claim had not been challenged it ought not, without more, to have formed any part of the learned master's decision and to have been struck out, as it seems to have been, at paragraph 58 of her decision.

The Appeals – Issues to be Determined

[17] This is an appeal from a decision of the learned master on an application to 'strike out and/or dismiss' RCC's claims in the court below. It must be borne in mind that this appeal does not involve a final determination of the issues between the parties, but rather, merely a determination of whether or not the learned master properly exercised her discretion in disposing of the Doctors' application to 'strike out and/or dismiss' the claims. The Court is only concerned with examining the issues to such an extent that it is able to make this determination.

[18] It is well established that an appellate court should be slow to interfere with the exercise of a judge's discretion unless the judge erred in principle or in his/her approach by taking into account or being influenced by irrelevant factors and considerations, or failing to take account of or giving too little weight to relevant factors, and that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.[4] This Court will therefore examine the learned master's decision to determine whether she made any errors of principle in dealing with the application before her. Only then will this Court be in a position to interfere with her decision.

[19] The challenges made by both parties on appeal had to do only with RCC's tort claim and the contribution/indemnity claim made pursuant to US law provisions and article 989C(1)(c) of the Civil Code, both of which were struck out by the learned master. The Doctors did not challenge the master's decision to allow

[4] Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188.

RCC's claim in contract to proceed to trial. Accordingly, in this appeal, the Court will examine the following three issues, for the purpose of determining whether the learned master was correct in striking out the tort and indemnity/contribution claims:

(1) Whether the tort claim is prescribed under article 2122 of the Civil Code by 3 years;

(2) Whether the indemnity claim pursuant to US law is viable;

(3) Whether the indemnity/contribution claim has been made out on the pleadings for the purpose of article 989C(1)(c) of the Civil Code.

Summary judgment under Part 15 of CPR 2000 vs Striking out under CPR 26.3(1)(b)

[20] Before proceeding any further, it bears noting that it was not altogether appropriate for the Doctors to state in their application that they were seeking to have RCC's claim 'struck out and/or dismissed', for the simple reason that use of the 'and/or' conjunction signifies that they were seeking either one or both of these results. The dismissal which the Doctors speak about here appears to mean dismissal after the entry of summary judgment, based on the grounds of their application and the CPR rules pursuant to which the application was made. The strike out and summary judgment procedures, however, ought not to be conflated in this way. One procedure should not be viewed as being "just as good as the other". These are two distinctly different procedures which have different requirements and would be used in different circumstances leading to different legal consequences. In particular, the two certainly cannot operate simultaneously.

[21] The legal tests for entering summary judgment under Part 15 of CPR and for striking out a party's statement of case under rule 26.3(1)(b), while closely worded, are not the same. They should not be confused with each other. CPR 15.2 states as follows:

"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –

(a) claimant has no real prospect of succeeding on the claim or the issue; or

(b) defendant has no real prospect of successfully defending the claim or the issue." (Emphasis added).

CPR 26.3(1)(b) states as follows:

"26.3(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) …

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;" (Emphasis added).

[22] Either a claimant or a defendant may apply for summary judgment to be entered on a claim or a particular issue pursuant to CPR 15.4(1) and (2), or the court may exercise its powers and deal with the claim or issue summarily at any case management conference pursuant to CPR 15.4(3). A party who applies to have summary judgment entered on a claim must file affidavit evidence in support of the application and so too must a respondent who wishes to rely on evidence. This filing of affidavit evidence is a crucial part of the summary judgment procedure and forms the basis for the court's application of the legal test for entry of summary judgment.

[23] While a claimant's pleaded case may be properly constituted, it may very well be completely hopeless in the face of a defendant's defence, and therefore, the claimant will have no real prospect of succeeding. Similarly, a defendant who puts forward a defence which clearly cannot stand up to a claimant's pleaded case will have no real prospect of successfully defending the claim. In either of these instances, it would be appropriate for the court to enter summary judgment on the claim pursuant to Part 15 of CPR provided that the issues in the claim are ones which are suitable to be dealt with using the summary procedure.[5] In disposing of

[5] "Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be

a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits.

[24] On the other hand, an application for a party's statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties' pleaded cases before it. No additional evidence is adduced. All facts pleaded in the statement of case are assumed to be true for this purpose.[6] In Citco Global Custody NV v Y2K Finance Inc,[7] a case in which the learned judge in the court below erroneously applied the legal test for the entry of summary judgment to an application by the defendant to strike out the claimant's claim,[8] the ECSC Court of Appeal set out the instances in which it would be appropriate to grant a defendant's application to strike out a claim pursuant to CPR 26.3(1)(b). Edwards JA stated as follows:

> "Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3(1)(b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.[2] [*See Blackstone's Civil Practice 2009 at page 431.*]"

Therefore, essentially, a strike out application under CPR 26.3(1)(b) would be the appropriate procedure if a party to an action is faced with a statement of case which is plainly just bad in law. In any of the instances mentioned above by Edwards JA, the test whether the statement of case discloses no reasonable ground for bringing the claim, would clearly be satisfied.

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properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues." (Dicta of Elias CJ cited by the Privy Council in Robert Edward Jones v Her Majesty's Attorney-General sued on behalf of New Zealand Police [2003] UKPC 48 at para. 5).

[6] Citco Global Custody NV v Y2K Finance Inc. BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

[7] BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

[8] The application to strike out was made pursuant to CPR 26.3(1)(b) although it did not expressly say so – see para. 19 of the judgment.

[25] I also find the pronouncements of Edwards JA in Citco at paragraph 14 of the judgment to be very instructive:

> "Among the governing principles stated in **Blackstone's Civil Practice** 2009[5] [*At page 432 paragraphs 33.9 and 33.10*] the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development;[6] [*See also The Caribbean Civil Court Practice 2008, page 231: "… a case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law: Farah v British Airways plc and the Home Office (2000) Times, 26 January CA."*] or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case. Also, before using CPR 26.3(1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case.[7][*Op. cit. at page 429-430: paragraph 33.6*] Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings[8][*Op. cit. at page 431 paragraph 33.7*] and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly."

[26] The Privy Council, in the case of **Robert Edward Jones v Her Majesty's** Attorney-General sued on behalf of New Zealand Police,[9] was faced with the task of determining whether the Court of Appeal of New Zealand had erred in holding that summary judgment should be entered for the Attorney General, who was the defendant in proceedings in the court below commenced by the appellant, Robert Jones. The summary judgment order was made under Rule 136(2) of the High Court Rules which is analogous to our CPR 15.2(a). Rule 136(2) permits the court to give judgment against a plaintiff 'if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed'. The Board, at paragraph 5, cited with approval dicta of Elias CJ in Westpac Banking

[9] [2003] UKPC 48.

Corporation v MM Kembla New Zealand Ltd[10] in which the learned Chief Justice carefully explained the difference between the summary judgment and strike out procedures:

> "[60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R 186. Rather R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.
>
> "[61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.

[27] In the English case of Swain v Hillman and Another[11] the Court of Appeal compared the two English Civil Procedure Rules 24.2 and 3.4(2)(a), which are practically identical to our rules 15.2 and 26.3(1)(b) of CPR 2000, respectively. At page 92 of the judgment, Lord Woolf MR opined:

> "Clearly, there is a relationship between r 3.4 [which deals with the court's power to strike out a statement of case] and r 24.2 [which deals with summary judgment]. However, the power of the court under Pt 24 … are wider than those contained in r 3.4. The reason for the contrast in language between r 3.4 and r 24.2 is because under r 3.4, unlike r 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.
>
> "Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's

[10] [2001] 2 NZLR 298.
[11] [2001] 1 All ER 91.

favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful."

[28] Therefore, for the strike out procedure, the pleadings alone are examined and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation to the same dispute. They are perfectly entitled to do so. The situation is different, however, with the summary judgment procedure since this procedure gives a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court.

[29] One cannot contemplate that both a strike out and a summary judgment application can be successful at the same time since, due to the nature of the two procedures, if the legal test of one is satisfied, then the legal test of the other will necessarily not be satisfied. If a party's claim or defence is struck out on the basis that it discloses no reasonable ground for bringing or defending the claim (respectively), then it follows that the claim or defence will not satisfy the higher threshold of being a 'properly constituted' claim or defence, albeit one which has no real prospect of succeeding on, or successfully defending, the claim or issue. And of course, if a claim or defence is properly constituted and the legal test for summary judgment can properly be applied to it, then necessarily, it will not be a claim or defence which is suitable to be considered for the strike out procedure. Also, in the particular case of a strike out application made by a defendant, if the claim is struck out, then there are no proceedings remaining for summary judgment to be entered in favour of the successful defendant.

[30] Thus, the two procedures, while related in the sense that they both serve the very important purpose of furthering the overriding objective of the Rules by ensuring that the court's resources are not wasted on claims which should not be allowed to go past the initial stages, it is clear that they have different procedural

requirements, entail different considerations and have different legal consequences.

[31] There may be some merit, however, in seeking to apply for the entry of summary judgment as an alternative to striking out, in the event that an initial strike out application is unsuccessful. It will be necessary though, to ensure that the specific requirements of each one of the procedures are satisfied. So for instance, affidavit evidence would have to be provided to support the summary judgment application and also, the other specific requirements set out in Part 15 for applying for summary judgment will have to be met. The Doctors did file an affidavit in support of their application to 'strike out and/or dismiss' RCC's claims. In this affidavit, however, the Doctors appear to do little more than briefly set out the grounds of their application which all clearly sought to establish that RCC was, for various reasons, not entitled to bring their contract, tort and indemnity/contract claims in the first place. In my view, these seem like grounds supporting a strike out application only, and not one for the entry of summary judgment as well.

[32] In the present case, notwithstanding that the Doctors somewhat conflated the striking out and summary judgment procedures in their application, I am satisfied that for the most part, the learned master initially applied the legal test for striking out to the various claims, and only thereafter contemplated the entry of summary judgment on the claims. For instance, right after setting out the submissions of both parties to the contract claim, she stated:

> "My obligation at this stage of the proceedings is to determine whether taken at its highest, what was pleaded by the Claimant discloses a reasonable cause of action in contract, capable of proceeding to trial.
>
> "To achieve that objective, the preferred course is to assume that what is said in the claim is in fact true and to determine whether based on that, a cause of action has been pleaded in contract."

This is, unmistakably, the strike out test being applied to RCC's contract claim. The master then cited cautionary words of the Court of Appeal as it relates to entering summary judgment at a preliminary stage of the proceedings, and left it at

that. I shall now move on to determining whether the learned master properly exercised her discretion in applying the legal tests to RCC's tort and indemnity/contribution claims.

RCC's Tort Claim – Prescribed under article 2122 of the Civil Code?

[33] RCC's amended claim form and statement of claim were served on the Doctors in July 2013 and it is not in dispute that Mr. Sterling was last cared for by the Doctors on 9th April 2010. With regard to RCC's claim in tort, two issues arise. The first of these, is which article of the Civil Code does the claim in tort fall under for the purpose of determining what limitation period applies? Was it article 2121(7) which provides for a 6 year limitation period? Or was it article 2122(2) which provides for a 3 year limitation period? Secondly, what, in the circumstances, would have been the date from which time would have begun to run for limitation purposes? The learned master held that article 2121(7) of the Civil Code was the applicable provision and, the amended claim which joined the Doctors to the action having been filed in July 2013, she concluded that RCC's claim in tort was not prescribed. The Doctors, however, argued that the learned master erred in this regard, and that the applicable provision was article 2122(2) of the Civil Code, making RCC's amended claim prescribed.

[34] Articles 2121 and 2122 of the Civil Code warrant being set out in full:

> "2121. The following actions are prescribed by 6 years:
>
> 1. For professional services and disbursements of advocates and attorneys, reckoning from the date of the final judgment in each case;
> 2. For professional services and disbursements of notaries, and fees of officers of justice, reckoning from the time when they became payable;
> 3. Against notaries, advocates, attorneys, and other officers or functionaries who are depositaries in virtue of their office, for the recovery of papers and titles confided to them; reckoning from the termination of the proceedings in which such papers and titles were made use of, or, in other cases, from the date of their reception;
> 4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of merchandise, whether negotiable or not,

or upon any claim of a commercial nature, reckoning from maturity; bank notes, however, being excepted from this prescription ;

5. Upon sales of movable effects between non-traders, or between traders and non-traders, these latter sales being in all cases held to be commercial matters ;
6. For hire of labour, or for the price of manual, professional, or intellectual work and materials furnished, saving the exceptions contained in the following articles;
7. For visits, services, operations and medicines of physicians or surgeons, reckoning from each service or thing furnished."

Article 2122 states as follows:

"2122. The following actions are prescribed by 3 years;

1. For seduction, or lying-in expenses;
2. For damages resulting from delicts or quasi-delicts, whenever other provisions do not apply;
3. For wages or salaries of employees not reputed domestics and who are engaged or hired for a year or longer period;
4. For sums due to schoolmasters and teachers, for tuition, and board and lodging furnished by them." (Emphasis added).

[35] The Doctors submit that regardless of whether there is ambiguity in a provision of the Civil Code, the court can and should have regard to extraneous materials in interpreting it, and such is the case with article 2121(7) in particular. The Doctors cited the case of Poliniere v Felicien[12] in support of this submission. At page 893E-F of Poliniere, Lord Hoffmann stated:

> "Their Lordships consider that anyone attempting to interpret the Civil Code must bear in mind that it is derived, in most cases word for word, from the Quebec Civil Code of 1865, which in turn was derived from the Code Civil of France. In adopting the Saint Lucia Civil Code, the legislature must in their Lordship's view have intended that its terms should be construed with due regard to what they had been understood to mean in Quebec and France. The jurisprudence which has been attached to the provisions of the Code by the courts and legal writers of those countries must at the very least have considerable persuasive authority. Their Lordships therefore consider that it was unwise for the judge and the Court of Appeal to have attempted to construe them without any reference to their civilian background."

[12] [2000] 1 WLR 890.

Accordingly, the Doctors argue that the Court may therefore have regard to article 2260 of the Civil Code of Lower Canada ("the Quebec Code")[13] and the preamble to the amendment thereto, to satisfy itself that the terms of article 2121(7) are construed with due regard to what it was understood to mean in Quebec. The Doctors state that this preamble of the amended article 2260 is of material relevance in explaining the meaning which was at all times intended to be attributed to the words of article 2260, and by extension, article 2121(7) of the Civil Code.

[36] The Doctors submit that the learned master erred in equating the ejusdem generis principle with the principle in the case of St. Rose v Lafitte[14] in seeking to interpret article 2121(7). These were two different principles, and it was the latter principle that ought properly to have been applied. According to the principle in St. Rose v Lafitte, the meaning of article 2121(7) must be determined by reference to the whole article. The Doctors contend that articles 2121(1), 2121(2) and 2121(6) apply to claims commenced by professionals against clients for the costs of, or their fees for, services rendered. The preamble to the 1869 amendment of the Quebec Code, which can be used as an aid to interpretation, provides that it is "An Act to amend Article 2260 of the Civil Code as respects Fees due Physicians". The Doctors therefore submit that it is clear that article 2260 applies to claims in respect of physicians fees and not otherwise. In particular, it does not apply to claims by patients against physicans/doctors for their fees or for the tort of negligence in respect of the services provided. Accordingly, they submit, article 2121(7) of the Civil Code is inapplicable to the present proceedings and the learned master erred in applying same. There being no other provisions of the Civil Code which apply, the claim against the Doctors in negligence/delict was prescribed by 3 years pursuant to article 2122(2), that is, on 9th April 2013. The Doctors submit that there is no necessity for a trial in order to properly

[13] The Doctors state that article 2260 of the Quebec Code is in all material respects pari materia with article 2121(7) of the Civil Code of Saint Lucia.
[14] (1992) 42 WIR 113.

determine the issue of prescription as there is no dispute as to the facts relevant to the issue.

[37] RCC, on the other hand, submits that the learned master was entirely correct to hold that article 2121(7) was the applicable provision and alternatively, even if the decision was questionable, the point is at least arguable, and therefore, necessarily suitable for trial, and not for further consideration in the context of a strike out / summary judgment application brought by the Doctors.

Discussion

[38] The Quebec Code provides some very good insight as to how article 2121(7) is to be interpreted and is highly persuasive in the absence of any authority in this jurisdiction. In my view, on its face, there is some ambiguity in the wording of subsection (7) of article 2121 and thus, recourse to extraneous materials as an aid to interpretation may well be necessary. I find the dicta of Lord Hoffmann in Poliniere v Felicien to be very persuasive and in my view, applicable to the case at bar. The preamble to article 2260 does suggest that article 2121(7) has a different meaning to the one which it was given by the learned master and by RCC. It does not appear to contemplate a claim by a patient in negligence in respect of the services rendered by a doctor. Indeed in being prefaced by the word "For" it appears to create a claim which may be brought only by the professional man who provided the services rather than giving rise to a claim in favour of the person who received such services.

[39] Although the learned master did not strike out RCC's tort claim on the basis that it was prescribed, the mere fact that it was at least arguable which article of the Civil Code applied for the purposes of limitation, and also, that it may have been necessary to have regard to extraneous materials in aiding with the interpretation, this should have indicated to the master that the claim ought to have been allowed to proceed to trial and that it was neither suitable for striking out nor for the entry of summary judgment. In particular, in coming to a decision on whether RCC's tort

claim was statute barred, it would have been necessary for the master to refer to more than just the pleadings before her. Accordingly, striking out would clearly not have been appropriate. It can plainly be said that this argument on prescription 'involves a substantial point of law which does not admit of a plain and obvious answer'[15]. However, the learned master proceeded to attempt to make a determination on this issue in order to decide whether it ought to be struck out or not. I find this to have been inappropriate and an error in principle. Although the Doctors may well have an arguable case on whether RCC's tort claim is prescribed, they cannot succeed in having it struck out at this stage of the proceedings and hence cannot succeed on their appeal, for the simple reason that this is not the appropriate stage of the proceedings for the issue to be finally determined, since what is essentially before the court is a strike out / summary judgment application and neither of these procedures are applicable in the circumstances for the reasons which I have set out above.

RCC's Tort Claim – When did the cause of action arise?

[40] The Doctors contend that any cause of action in tort would have arisen at the very latest, by 9th April 2010. RCC contends that in the present proceedings, time would have begun to run for the purpose of prescription from 26th October 2010 at the earliest, which was when Paul Sterling made a demand against RCC for the settlement of his claim. Accordingly, RCC argues, even the 3 year prescription period would not have elapsed upon service of the claim on the Doctors in July 2013. The respondent relies on the case of Law Society v Sephton & Co (a firm) and others.[16] In that case, a critical issue was the date the damage had occurred, for the purpose of the statute of limitations. The Law Society had relied on reports which were negligently prepared by an accountant, which reports confirmed a solicitor's compliance with the Law Society's accounting rules. Claims for compensation were subsequently made against the Law Society by clients whose monies were misappropriated by the solicitor and these claims were paid

[15] See para. 14 of Citco Global Custody NV v Y2K Finance Inc (BVIHCVAP2008/0022 (delivered 19th October, unreported)).
[16] [2006] 2 AC 543.

out of the Law Society's indemnity fund. The accountant contended that the Law Society suffered damage whenever the solicitor misappropriated the client's money after the issuance of a negligent report. The Law Society maintained that it suffered damage only when a claim for compensation was made by the solicitor's client. All that could be said was that once there had been a misappropriation, it was likely that there would be a claim but the Law Society could not have commenced proceedings on the basis that claims were likely.

[41] The House of Lords held that the Law Society did not suffer actual damage at the time of the misappropriations. It suffered actual damage only when it paid out monies pursuant to its public law duties to make discretionary payments from the compensation fund. The Doctors contend that the Law Society case is distinguishable from the instant proceedings in that it involves a 'purely personal and wholly contingent liability' – until a claim was made, no damage or liability was incurred by the Law Society. By contrast, in the instant matter, RCC's liability did not depend wholly or entirely on a future event or contingency but arose immediately upon the allegedly negligent treatment of Paul Sterling, which treatment RCC alleged it was, at all times, liable to pay.

Discussion

[42] I am inclined to agree with the Doctors' submissions on this point. The facts of the instant case are not on all fours with those of the Law Society case. It is certainly arguable that the cause of action would have arisen when Mr. Sterling was treated at Tapion Hospital. In any event, more is needed than just the straight facts based on RCC's pleaded case to show that the cause of action arose at any time other than when Mr. Sterling was treated at Tapion Hospital. This matter, being fact sensitive, is not one which is amenable to the strike out or summary judgment processes and ought to have been left for trial.

[43] The Doctors sought to have RCC's claim in tort struck out on the basis that it was prescribed. However, the learned master ultimately struck it out not on the basis

of prescription but on the basis that there was no relationship of proximity between RCC and the Doctors which would give rise to a duty of care in tort. Both sides, however, were ad idem that this was a wrong ruling on the basis that there was a proper claim in contract and the alleged tort would have flowed from that contractual relationship. It is accepted by the Doctors that there was a claim to go to trial on contract. Therefore, by extension, the learned judge could not have held that the relationship proximity test had not been made out, because this was an alleged tort that would have been flowing from the alleged contractual relationship based on the facts as pleaded. If the existence of a contract between RCC and the Doctors for the provision of medical services to Paul Sterling is proved at trial, same may arguably create a relationship of proximity for the purpose of the duty of care in tort. This, in my view, was a further error in principle made by the learned master, and it being the basis for her decision to strike out the claim in tort, that puts this Court in a position to interfere with her decision.

[44] As I previously mentioned, the mere fact that each party was able to put forward some argument in favour of their position on the prescription issue, which appeared to ultimately involve arguments on statutory interpretation, clearly illustrates that it would not have been proper for the tort claim to be struck out on that basis. Apart from that, both parties were in agreement that the tort claim should not have been struck out for the reasons which the learned master gave (relating to proximity). These were two errors of principle made by the learned master since she took into account more than she should have, in coming to a decision on whether the tort claim should have been struck out, and was indeed influenced by this irrelevant consideration. I accordingly find that RCC's claim in tort should not have been struck out, and ought to have been allowed to proceed to trial. The learned master erred in striking out that part of RCC's claim. For the same reasons that it would have been inappropriate to strike out RCC's claim in tort, it would have also been inappropriate to enter summary judgment for the Doctors on this point.

RCC's Contribution/Indemnity Claim

[45] One of the claims made by RCC was in indemnity and/or contribution and/or restitution pursuant to certain US law provisions and article 989C(1)(c) of the Civil Code.[17] RCC alleged that it was compelled by (US) law to pay money in settlement of Mr. Sterling's claim, based on US law provisions (statute as well as case law), and that this was money which Medical Associates Ltd. and the Doctors would have been liable to pay. Accordingly, it claimed an indemnity and/or contribution and/or restitution from them. RCC averred that it, along with Medical Associates Ltd. and the Doctors, were joint tortfeasors in relation to the condition of Mr. Sterling, and thus, it is entitled to claim a contribution from them pursuant to article 989C(1)(c) of the Civil Code.

[46] Article 989C(1)(c) of the Civil Code states as follows:

> "989C.
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)-
>
> (a) …
>
> (b) …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort feasor [sic] or otherwise, so, however, that no person shall be entitled to recover contribution under this article from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

The Doctors submit that to ground a claim for contribution under article 989C(1)(c) of the Civil Code, RCC is required to plead facts material to establishing the following two things:

(i) that RCC is a tortfeasor liable in respect of Paul Sterling's (alleged) injuries; and

[17] Cap. 4.01, Revised Laws of Saint Lucia 2008.

(ii) that the Doctors are tortfeasors who would, if sued, have been liable in respect of the same damage, that is, Paul Sterling's (alleged) injuries.

[47] They contend, however, that the determination of RCC's and the Doctors' tortious liability to Paul Sterling must be pleaded, founded and determined under and in accordance with the laws of Saint Lucia. The Doctors contend that a foreign settlement cannot found a claim for relief under article 989C(1)(c). They submit, in the alternative, that RCC, by pleading its strict liability under and pursuant to US law has not pleaded the facts material to establishing a cause of action under article 989C(1)(c). For RCC to fall within the first limb of article 989C(1)(c), it must positively plead and particularise the facts material to showing that it negligently failed in its duty to arrange proper medical services for Paul Sterling. RCC must plead that it is at fault, which it has not done. The Doctors contend that RCC's pleadings are that it was vicariously liable as a tortfeasor singularly by virtue of the application of US law and without any fault on its part. Nowhere in its pleadings does RCC plead or aver that it was negligent in arranging medical services for Paul Sterling for the purpose of establishing liability as a tortfeasor under and pursuant to the laws of Saint Lucia. The Doctors cite the case of Fourth Transoceanic Shipping Co. Ltd. v Dr. Raymond Smith[18] as authority for their submission that RCC's tortious liability must be founded in accordance with the laws of Saint Lucia.

[48] The Doctors submit that because RCC relies exclusively on the foreign settlement made pursuant to the Jones Act and US maritime law as the basis of its entitlement to claim contribution under 989C(1)(c), such a pleading is unavailing for the purpose of establishing a cause of action under 989C(1)(C) and ought to be struck out.

[49] RCC, on the other hand, submitted that the 'tortfeasor' being referred to in article 989C(1)(c) is properly interpreted as meaning 'liable as a tortfeasor in a manner

[18] Appellate Jurisdiction 1996 No. 395 (Bermuda, unreported).

that has been or could be established', also relying on the case of Fourth Transoceanic Shipping Co. Ltd. v Dr. Raymond Smith in support of this point. RCC further states that there is no need for judgment, nor for proceedings, to establish liability as a tortfeasor as required for purposes of seeking a contribution under article 989C(1)(c). The article does not require the second tortfeasor to have been sued by the injured party, whether within the prescription period for the primary claim, or at all. It is enough that the second tortfeasor 'would if sued' have been liable. The question then is whether RCC faced a potential liability in tort to Mr. Sterling under Saint Lucia law.

Discussion

[50] The question here is whether one can rely on those provisions of US law for grounding a cause of action in Saint Lucia. In my view, the law has territorial effect. It does not operate extra territorially. I find the Bermudan case of Fourth Transoceanic Shipping Co. Ltd. very persuasive on this point. The facts of this case were essentially on all fours with those of the present proceedings. It involved a shipping company whose employee (working on board the ship) was diagnosed with a pterygium (an abnormal growth) on his left eye. The ship's doctor referred the employee to a local consultant eye surgeon in Bermuda for further evaluation and treatment. The surgical procedure was carried out negligently by the local eye surgeon (the fact that he had been negligent was essentially admitted by the local surgeon though) and the employee suffered damage as a result. The employee brought proceedings against the shipping company in the United States, under the Jones Act, and the general maritime law of the US. The shipping company settled the case out of court. The Bermudian eye surgeon was not a part of the proceedings, but the shipping company attempted to recover, by way of contribution from the doctor, the damage suffered by it pursuant to section 5(1)(c) of the Law Reform (Liability in Tort) Act 1951. This section of the Law Reform (Liability in Tort) Act 1951 is essentially identical to our article 989C(1)(c) of the Civil Code. The court held that the shipping company was not able to recover contribution from the doctor as a joint tortfeasor with it (the

shipping company), since the phrase 'any tortfeasor liable in respect of that damage' means 'liable as a tortfeasor in a manner that has been or could be established under Bermuda Domestic law' (my emphasis). The court further held as follows:

> "It could not reasonably be the intention of the legislature that any liability that can be established in any court outside of Bermuda would be capable of founding a claim for contribution under Section 5(1)(c). Although Section 5(1)(c) is not restricted to the Bermuda Courts in express terms it is in fact so restricted because the Act applies only to Bermuda."

[51] The question here is whether RCC pleaded affirmatively and admitted that it is a joint tortfeasor liable. As it stands, nowhere in its pleadings has it made a positive assertion to this effect. In order to claim contribution under article 989C(1)(c) of the Civil Code, you must be a joint tortfeasor liable and not merely by virtue of a foreign law provision. Rather, the liability must be established in Saint Lucia, which is the jurisdiction within which article 989C(1)(c) operates.

[52] RCC sought to say in its arguments before the Court that it is left open on the pleaded case to infer that they are a joint tortfeasor liable on what they have not done in terms of arrangements they made for Mr. Sterling's treatment at Tapion Hospital. But that appears to be well met by the Doctors' response that it must not be left to an inference, it must be an express averment (see Lord Denning in the case of Stott v West Yorkshire Road Car Co. Ltd. and Another[19] at page 657 which says when a tortfeasor settles an action, he cannot claim contribution from the other tortfeasor unless he proves that he himself was liable). This case settles this point. RCC made no averment that it is a joint tortfeasor liable and so on that basis, its claim for contribution is not made out under article 989C(1)(c).

[53] Accordingly the indemnity/contribution claim pursuant to US law provisions and article 989C(1)(c) of the Civil Code is not made out on the pleadings and is rightly struck out, although not for the reasons which were given by the learned master.

[19] [1971] 2 QB 651.

[54] Unfortunately, RCC has not sought to make a subrogation claim, but one based on indemnity/contribution hinged on their admission of liability to Mr. Sterling as a joint tortfeasor. RCC is not seeking to advance a claim against the Doctors in subrogation standing in the shoes of Paul Sterling.

[55] Irrespective of the outcome of the claims looked at in this appeal, it was clear that the claim in contract as well as the one in contribution/indemnity based on the common law would have gone to trial. This therefore questions the wisdom of the Doctors taking this step – attempting to strike out various parts of RCC's proceedings. All RCC needed to do was show that the matters challenged by the Doctors were, at the very least, arguable, for the claim to proceed to trial anyway. It is imperative that practitioners be cognisant of the cost and time implications of the different avenues in the litigation process. Moreover, parties are advised to pay heed to the relevant authorities in determining whether to engage the strike out procedure or to apply for summary judgment when faced with a claim or defence which, it appears, may be challenged in the very early stages. The two procedures clearly became conflated in the present case, which was improper. We urge parties to be mindful of the fact that striking out is the process to be adopted in only obvious, clear circumstances and where it can be clearly seen as a cost and time saving approach. One cannot say that in the particular circumstances of this case that this has been the result.

Conclusion

[56] The Doctors succeeded in having RCC's contribution/indemnity claim (relating to article 989C(1)(c)) struck out, but not in having the tort claim struck out on the basis of prescription. RCC succeeded only in having the tort claim proceed to trial. I would therefore dismiss the Doctors' appeal but allow their counter notice of appeal and I would allow RCC's appeal in part, for the reasons given above on the various issues arising in the matter. I would also order that costs be costs in the cause in the matter below. Therefore, in summary, I would order as follows:

1. RCC's claim in contract is to proceed to trial as was ordered by the learned master.

2. RCC's claim in tort is to proceed to trial and the decision of the learned master striking it out is accordingly set aside.

3. RCC's claim in indemnity and/or contribution and/or restitution pursuant to US law provisions and article 989C(1)(c) of the Civil Code is struck out as was ordered by the learned master (although not for the same reasons).

4. RCC's claim in contribution at common law is to proceed to trial, there being no challenge to it by the parties in the court below.

5. Costs are costs in the cause in the matter below.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]