

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO.: SLUHCM2020 /0006

BETWEEN:

EXQUISITE HOMES LIMITED

Claimant

and

GEEST INDUSTRIES (ESTATE) LIMITED

Defendant/Ancillary

Claimant

and

- 1. MAXIMILUS JOHANNES**
- 2. GEORGE CHARLEMAGNE**

Ancillary Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr Horace Fraser for the Claimant

Mrs Cynthia Hinkson-Ouhla with Ms Natalie DaBreo for the Defendant/ Ancillary Claimant

Mr Jeannot Michel-Walters for the Ancillary Defendants

2022: May 30; 31

DECISION

- [1] ST ROSE-ALBERTINI, J. [Ag]:** Exquisite Homes Limited ("EHL") has filed a claim against Geest Industries (Estates) Limited ("Geest") for damages for breach of contract and

unlawful interference with contractual relations. The essence of EHL's claim is that Geest committed repudiatory breach of a contract for the sale of land from Geest to EHL, when it entered into negotiations with the Government of Saint Lucia (the "Government") for acquisition of the said land, which was subsequently compulsorily acquired. EHL alleges that Geest caused the Government to interfere with the said contract and named the Attorney General as second defendant. A notice of discontinuance of the claim was subsequently filed in relation to this defendant.

- [2] Geest has defended the claim and filed an ancillary claim against Maximilus Johannes ("Mr. Johannes") and George Charlemagne ("Mr. Charlemagne"), EHL's former Managing Director and Attorney-at-Law respectively (together "the ancillary defendants"), for breach of fiduciary duty. Geest alleges that Mr. Johannes and Mr. Charlemagne conspired with EHL to wrongfully interfered with its business interests, and failed to account for monies received on Geest's behalf. The ancillary defendants have each defended the ancillary claim and filed their own counterclaims for payment of outstanding salary and legal fees.

The Preliminary Issues

- [3] The following preliminary issues arose for determination:
1. Whether the ancillary claim is properly filed and stands as a valid claim before the Court?
 2. If not, can the defect be cured such that the ancillary claim can proceed; or is it a nullity which cannot be cured,?
 3. If the ancillary claim is a nullity which cannot be cured, such that there is no ancillary claim before the Court, what should be the fate of the ensuing counterclaims filed by the ancillary defendants.
- [4] The irregularities with respect to the ancillary claim were observed by the Court and brought to the parties' attention on 5th May 2022. They were as follows:
1. The Defence and Counterclaim filed on 1st April 2020, contains an Ancillary Claim Form set out in Form 9, together with the Particulars of Ancillary Claim, which

appear to be part of or an appendage to the Defence and Counterclaim, and are not filed as separate documents.

2. Thereafter the Defence and Counterclaim were amended three times, and on the last occasion with the Court's permission. However, in the three amended Defence and Counterclaims, that Ancillary Claim Form and Particulars are absent.

- [5] By an order of even date the parties were directed to file written submissions on or before 24th May 2022 and present oral submissions at a hearing scheduled for 25th May 2022. That hearing was adjourned at the request of Counsel for Geest and rescheduled to 30th May 2022. Written submissions were filed by EHL and Geest. Oral submissions were presented on behalf of the ancillary defendants, at the hearing.

EHL's Submissions

- [6] Counsel for EHL, Mr Fraser, couched the issues as (i) whether the ancillary claim form, which was not filed separately from the defence and counterclaim, as it ought to have been, is a nullity; and (ii) whether an order may be made to regularize this defect.
- [7] Relying upon the Privy Council decision in **Leymon Strachan v The Gleaner Company Limited et al and others**¹, EHL submits that as the ancillary claim form was not properly filed, it is without question a nullity. Nonetheless, an order may be made pursuant to rules 26.9 and 1.1 of the Civil Procedure Rules 2000 ("CPR"), to put the matter right. EHL describes the defect as purely procedural, and submits that it should be cured in the interest of justice. Counsel relied on dicta from **Texan Management Limited et al v Pacific Electric Wire and Cable Company Limited**² to make the point that: "*it has often been said that, in pursuit of justice, procedure is a servant and not a master.*" Counsel further stated that the court in **Kevin West et al v Shamrock Industries Ltd et al**³ had observed that the appellant in that case had been deprived of the hearing of his appeal on the merits because the court considered that there had been a procedural irregularity,

¹ [2005] UKPC 33

² [2009] UKPC 46

³ MINIHCV2015/0002, per Redhead J

however such course should rarely be taken, especially in relation to a technical breach. EHL says that courts exists to do justice between litigants and justice is not served by depriving litigants of the ability to have their cases decided on the merits because of a purely technical procedural breach, committed by an attorney. The case of **Natasha Francis v AG and others**⁴ was cited as authority for the proposition that a court is not obliged to automatically dismiss a claim for breach of a procedure, but has a discretion whether or not to dismiss it for such irregularity.

- [8] EHL further says it is clear from the wording of CPR26.9(2) that an error of procedure does not invalidate the proceedings, and CPR1.2 requires that the court must give effect to the overriding objective, when interpreting a rule or exercising any discretion given by the rules. EHL cites the case of **McDonna v Richardson**⁵ which it says provides an example of a nullity which cannot be cured or put right. There, the Court of Appeal made the distinction between an appeal filed out of time and one filed without leave. With respect to the former the right of appeal was said to exist and the failure to appeal in time was an irregularity, which the court had jurisdiction to cure by extending the time. Regarding the latter, it was said that no right of appeal existed and the appellant's failure to obtain leave to appeal left him debarred by the language of the statute. Thus a notice of appeal filed without obtaining the requisite leave was a nullity, which could not be cured or validated retrospectively. Any notice filed without leave being first obtained is simply of no effect and is completely valueless and void and cannot be revived by the subsequent granting of leave.

- [9] EHL concluded by saying that the ancillary claim was not properly filed, as the requisite fee was not paid, and is therefore a nullity. Nonetheless, such nullity can be cured by an order for payment of the fee, so long as Geest undertakes not to amend the claim. There is no bar from granting such relief and making an order to normalize the defect, as was done in the **McDonna** case.

⁴ ANUHCv2004/0306

⁵ Civil Appeal No. 3 of 2005

Geest's Submissions

- [10] Counsel for Geest, Mrs Ouhla, limits the irregularity to a mere omission to pay the filing fee, if at all such fee is payable, and formulates the issues as (i) whether any fee is payable on the filing of an ancillary claim filed along with the defence and counterclaim, on the Electronic Litigation Portal ("e-litigation portal" or "e-portal") and if so; (ii) whether the non-payment of this fee nullifies the ancillary claim, or whether the failure amounts to a procedural irregularity which can be cured.
- [11] In answer, Geest submits that the issue was not raised by the ancillary defendants in their pleadings or in their evidence and payment of fees is a matter for the court office. Further, the rules make no reference to payment of fees for an ancillary claim which is filed together with a defence and counterclaim, and there is no express sanction for non-payment of fees for an ancillary claim submitted for filing at the same time as a defence and counterclaim, or at all. Additionally, the ancillary claim was submitted for filing at the height of the pandemic, when e-filing was new to many practitioners and during this time it was permissible to provide an undertaking to pay court fees, for matters not submitted for filing on the e-portal, but via email. Geest says it could not be that a litigant who filed a claim on the e-litigation portal would not have the advantage of subsequently paying a fee, when this was readily available to a litigant who filed via email. Geest submits that dismissing the claim will cause grave prejudice to its case, whereas the ancillary defendants, who have never raised the issue, will suffer no prejudice. The defect can easily be cured by exercising the discretion to stay the proceedings until the fee, if payable, is paid.
- [12] Geest further states that CPR3.7(2) stipulates that a document is filed on the day it is received at the court office and CPR3.7(3) provides that if a fee is to be paid, a document is not to be treated as filed until (a) the fee is paid, or (b) an undertaking to pay the fee acceptable to the Registrar is given. The phrase '*not to be treated as filed until the fee is paid*' implies that on payment of such fee the document becomes properly filed and the irregularity of not paying the fee on the date submitted for filing is cured. Therefore,

payment of the fee and submission of the document to the court office on different days is not impermissible. As there is no sanction for non-payment of a fee, such an omission does not incur dismissal, and it is capable of being corrected upon payment of the fee. Geest further says that CPR 8.1 (2) states that a claim is issued on the date entered on the form by the court office and CPR 8.1(3) states that for the purposes of any enactment relating to the limitation of proceedings, a claim is initiated on the day on which the claim form is filed at the court office. Thus, the issue of non-payment of the fee would only affect proceedings which involve the question of limitation, in that the failure to file the document prior to the prescriptive period bars the claim. Non-payment of the fee does not have that effect in any other circumstance. Geest contends that automated e-filing now means there is no date entered by the court office, and the novelty of the e-portal has made the procedure open to such human errors.

- [13] The issue of jurisdiction pursuant to CPR 9.7(1), (2) and (5) was raised, with Geest contending that the ancillary defendants filed an acknowledgment of service, but did not make an application to challenge the court's jurisdiction to try the claim within the period for filing a defence. They must therefore be treated as having accepted that the Court has jurisdiction to try the claim. As the time for mounting such challenge has long gone, the claim should, in the interest of justice, proceed subject to the payment of the fee, if applicable. Counsel submits that striking out is a draconian measure which should be used sparingly, and only in instances where the irregularity is so bad that it is incurable. This is not the case as the rules specifically state that on payment of the fee the claim is to be treated as filed.
- [14] On the issue of whether any filing fee is payable on an ancillary claim filed on the e-portal, Geest argues that CPR 8.1 provides that a claim is issued on the date entered on the claim form by the court office. An ancillary claim, other than a counterclaim, is made when the court issues the ancillary claim form. In contrast, a counterclaim is made when it is filed. In both instances, the court office is responsible for managing the process of filing and issuing of ancillary claims and there are two ways of curing the defect concerning payment of fees; either by payment of the fee, or by giving an undertaking to pay which is acceptable to the Registrar. Both methods are done through the court office, and the non-

payment does not affect the validity of the documents, once the fee is proffered and accepted. Geest maintains that this is an irregularity which can be easily corrected and is a matter between the paying party and the court office. If a fee is owed, it can be paid, and the ancillary claim treated as filed, and allowed to proceed. Geest submits that it might well be that no fee is payable, but in any event under CPR 18.11(1) a person on whom an ancillary claim form is served becomes party to the proceedings if that person is not already a party, and there is no doubt that the ancillary claim was served.

- [15] In concluding Geest submits that CPR1.3 exhorts parties to litigation to further the overriding objective to enable the court to deal with cases justly. CPR1.2 mandates that if a rule is to be interpreted or a discretion exercised, the court must seek to give effect to the overriding objective, and dealing with cases justly means dealing with the substantive issues before the court. The Court was asked to declare that no fee is payable, or allow Geest to pay the fee, and proceed with the claim, pursuant to CPR 26.9 which empowers the Court to rectify procedural errors.

The Ancillary Defendants' Submissions

- [16] Counsel for the ancillary defendants, Mr Walters argued that the ancillary claim was not properly filed and is a nullity. In the circumstances, the court's jurisdiction has simply not been invoked in relation to it. CPR 3.7(3) says a document is not to be treated as filed until the fee is paid or an acceptable undertaking for payment is given to the Registrar, and it is then stamped and sealed by the court office. As this matter was commenced on the e-litigation portal, Statutory Instrument No. 7 of 2018 contains the Electronic Filing Rules and states at section 6(d) that a party must pay the requisite fee using the payment facility available on the e-portal and then submit the documents for uploading. No fee was paid, and no undertaking has been given. The ancillary claim was simply appended at the back of the exhibits relating to Geest's defence and counterclaim to the main claim. As it is a pleading which attracts a filing fee and no fee was paid, it is not to be treated as filed, as stated in CPR 3.7(3). Thus, Geest has failed to file the claim as required by law and there could be no proper service of a pleading that has not been filed. The red stamping which

appears at the top of a duly filed document is what confirms that it was filed at the court office for the purposes of the e-litigation portal, which not affixed to the ancillary claim. Mr Walters apologized for being inattentive to these matters which should have been raised much earlier on, and states that it would have been unjust for the ancillary defendants to be brought before the court on a defective claim. He clarified that the reference at paragraph 1 of the ancillary defendants' defences to an ancillary claim filed on 28th April 2020 was an error and was in relation to other documents which were regularly filed and included in the bundle served on the ancillary defendants.

- [17] Concerning jurisdiction, Mr Walters stated further that CPR 9.6 provides that a defendant who files an acknowledge of service does not lose the right to contest the court's jurisdiction, however at paragraph 1 of the ancillary defendants' defences, it is averred that the ancillary claim was served 28 days late and is prescribed. Moreover, CPR 29.6, being a general rule, cannot override, CPR 18.5(1), which is a specific rule relating to filing. In any event, CPR 26.9 only arises where the consequences of the non-compliance have not been specified and CPR 3.7 specifies that if the fee is not paid, a claim is not to be treated as having been filed. He says this is still the case to date, and the ancillary defendants continue to rely on their averment that the claim was extinguished by the date it was purported to have been served.

Analysis

Issue 1 : Is the Ancillary Claim properly filed as part of the Defence and Counterclaim?

- [18] EHL and the ancillary defendants agreed that the ancillary claim is not properly filed as part of the defence and counterclaim and should have been filed separately. Geest never addressed this critical issue, and as a result has fallen into grave and insurmountable error. CPR 18.1 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. It includes a claim by a defendant against any person, whether or not already a party, for contribution, indemnity,

or some other remedy.⁶ Geest purports to have made this claim against two other persons, not already parties, for various remedies.

- [19] CPR18.2 and 18.4 outline the procedure for bringing an ancillary claim. CPR18.2(1) provides that an ancillary claim is to be treated as if it were a claim except as provided by that rule. CPR 18.2(4) and (5) contain exceptions which are not relevant to the present case, however a relevant exception is found in CPR 18.2(2), which is the requirement that the ancillary claim be in Form 9 and that particulars of the ancillary claim be contained in or served with Form 9. Part 18 distinguishes between an ancillary claim that is a counterclaim, and other ancillary claims⁷ and 18.4(1)(a) permits an ancillary claim which is a counterclaim, to be filed without the court's permission, if it is filed with the defence. This is the only exception to 18.2(2) which requires an ancillary claim to be made in Form 9. This interpretation was confirmed by the Court of Appeal in **Indra Hariprashad-Charles v The Bank of Nova Scotia**⁸ where their Lordships explained the conjoint effect of rules 18.1(1), 18.2(1), 18.2(2), 18.4(1) and 18.4(7) as follows:

"[10] ... [A] counterclaim is an ancillary claim. Generally, an ancillary claim must be contained in or served with an ancillary claim form in Form 9. However, a defendant may file an ancillary claim by way of a counterclaim with the defence. When this is done the ancillary claim is made when the counterclaim is filed." [Emphasis added]

- [20] In contrast, CPR 18.4(1)(b), which deals with ancillary claims other than counterclaim, requires the ancillary claim form to be filed. Similarly, CPR 18.4(7)(b) provides that an ancillary claim, other than a counterclaim, is made when the court issues the ancillary claim form.
- [21] Given that an ancillary claim is to be treated as if it were a claim, it is necessary to examine the rules pertaining to claims in Part 8, to ascertain what other rules may be applicable to an ancillary claim. CPR 8.1(1) provides that a claimant starts proceedings by

⁶ CPR 18.1(a)

⁷ See CPR 18.1(1)(c), 18.2(5), 18.4(1), and 18.4(7).

⁸ SLUHCVP2014/0015 at para 10. See also *Dominica Agricultural and Industrial Development Bank v Jeannie Vier Lockart and Nola Paul-Lockhart v Stephen Isidore, (Trading Asisidore And Associates)* DOMHCV2017/0041.

filing in the court office the original and one copy (for sealing) of the claim form and statement of claim. CPR 8.1(2) states that a claim is issued on the date entered on the claim form by the court office. CPR 3.7 defines when a document is filed and it is on the day when it is received at the court office. Further, if a fee is to be paid, the document is not to be treated as filed until the fee is paid. CPR 3.9 deals with sealing of documents issued by the court and requires the court to seal a claim form upon issue. CPR 3.10(5) requires that a form marked with the word 'Seal' must bear the seal of the Supreme Court and Form 9 contains the word 'Seal'.

- [22] In my opinion, these matters are important as an ancillary claim, other than a counterclaim, must be made in Form 9 which is a separate and independent document from a defence and counterclaim. For such claim to be made, the Form 9 document must be filed at the court office, the relevant fee paid, and the document must then be issued by the court office by placing the date and seal of the court on the Form 9. If these requirements are not met, the ancillary claim cannot be considered to have been made. There can be no doubt that a fee is payable upon filing an ancillary claim. Geest suggests that this is not expressly stipulated in the rules however this is incorrect, as the rules direct that both Part 8 and Part 18 apply to ancillary claims and states how these rules are to be read together, along with the other rules to which they refer.
- [23] Parts 8 and 18 both require the ancillary claim to be 'filed'. CPR3.7 defines what it means to 'file' a document, and expressly includes payment of the requisite fee. It is expressed as a mandatory requirement that the requisite fee must be paid. Geest has provided no authority to substantiate its position that an ancillary claim form does not attract a filing fee. It is also incorrect that payment of the fee is a matter between the court office and the paying party which has no effect on the validity of the claim. The plain wording of CPR 3.7 conveys that a document must not be treated as filed until the fee is paid. It therefore follows that no claim can made or filed, unless and until the fee has been paid. Payment of the fee affects not only the validity of the claim, but the very existence of a claim.
- [24] Counsel for Geest suggests that CPR 3.7 does not apply to the filing of documents on the e-portal, and that no date or stamp of the court is applied to documents filed on the e-

portal in the way it would have been done at the court office prior to the advent of electronic filing. The **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules⁹** refutes this assertion and the relevant rules are reproduced below:

"Electronic submission of document

6. For electronic litigation filing of a document using the Electronic Litigation Portal, a party must —

(a) access the Portal by —

(i) visiting the Court's website and clicking on the link to the Electronic Litigation Portal, and

(ii) logging into the account provided by the Court under rule 5(4);

(b) enter information for new proceedings or information on existing proceedings;

(c) upload the document associated with the proceedings;

(d) pay the fees using the payment facility available on the Electronic Litigation Portal under rule 4(4); and

(e) submit the document.

Filing within and outside hours of business

9.— (1) The hours of business for electronic litigation filing are from 8:30 a.m. – 4 p.m. from Monday to Friday, excluding weekends and public holidays.

(2) A document to which the Court's stamp and the date of filing information has been applied by the Electronic Litigation Portal is deemed to be filed on the date and time that the document was submitted to the Electronic Litigation Portal, if the date and time of filing is within the hours of business for electronic filing.

(3) A document submitted through the Electronic Litigation Portal for filing outside the hours of business for electronic litigation filing or on a weekend, or public holiday is deemed to have an effective filing date as being the date when the Court's Registry is next open.

(4) Rules made by the Eastern Caribbean Supreme Court relating to holidays and computation of time apply to documents filed using the Electronic Litigation Portal.

(5) Notwithstanding sub-rule (4), a period during which the service is not available through the facility hosting the Electronic Litigation Portal is excluded from the computation of time.

Fees

10. The fees payable in respect of a document for electronic litigation filing are —

⁹ Statutory Instrument No 87 of 2018

- (a) the fee set out in the Eastern Caribbean Supreme Court (Court Proceedings Fees)(Saint Lucia) Rules; and
- (b) the fee specified in the Schedule¹⁰.

Processing by the Court's Registry

11.—(1) The Court's Registry, through the Electronic Litigation Portal, shall accept a document submitted for electronic litigation filing.

(2) Where a document has been submitted using the Electronic Litigation Portal

(a) an automated notification is generated in the notifications section of the Electronic Litigation Portal and must be available to the party once the party has logged into the system; and

(b) the notification under paragraph (a) must be sent by electronic mail to the electronic mail address of the party filing and other parties to the proceedings who are registered on the Electronic Litigation Portal.

(3) A filed document must be stamped and dated and by electronic means linked to the associated proceedings by the Electronic Litigation Portal.

(4) The Court's stamp and date of filing information must be applied to an electronically filed document by the Electronic Litigation Portal validating the authenticity of the document as being filed in the Court's Registry.

(5) On payment of the fees using the payment facility provided by the Electronic Litigation Portal, a paid stamp denoting payment must be applied to the document and the electronic litigation filing fees paid under rule 10 must be printed on the document." [Emphasis added]

- [25] Rules 9(2) and 11(1), (3), (4) and (5) explicitly convey that when a document is properly filed, by uploading it to the e-portal, paying the requisite fee using the electronic payment facility, and submitting the document as required by Rule 6, the court's stamp and the date of filing will be applied automatically and electronically by the e-portal. The document is then deemed to be filed on the date and time that it was submitted to the e-portal. The electronic dating and stamping of a document filed on the e-portal validates the authenticity of the document as being filed in the court's registry. Therefore, without the electronic date and stamp, the document is not validated as filed.

¹⁰ Amended by the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) (Amendment) Rules, Statutory Instrument No. 43 of 2019 by deleting the words "the Schedule" and substituting the words "Schedule 1".

[26] The procedure is the same, whether a document is filed electronically or physically. The fact of electronic filing via the e-portal does not preclude or exempt a litigant from the requirements of submitting the document in the requisite form and manner, paying the requisite fees and thereby obtaining the court's date and stamp in order to be considered as properly filed. Thus, the ancillary claim form made, not as a separate document, but as part of the defence and counterclaim and uploaded to the e-portal as such without payment of the requisite filing fee and thereby not attracting the electronic date and stamp, is not properly filed and is defective.

[27] In **Ornald Samuel and Josette Tommy v Kendrick Scarborough**¹¹ the Court of Appeal dealt with the effects of a defective ancillary claim. In that case the claim was filed in breach of an order by the master directing that it be filed and served by 3rd March 2006. It was not filed until 6th March 2006 and no extension of time was sought. A day or two later, the purported ancillary claim was served on the first ancillary defendant. A subsequent order directed that service on the first ancillary defendant be made by two consecutive newspaper publications, however the affidavit of service filed exhibited only one newspaper publication. The court held that a finding of liability in respect of the ancillary defendants in the court below was premised on a defective ancillary claim which was issued contrary to the master's order. Consequently, service of the defective ancillary claim would likewise amount to no service on the ancillary defendants. The court also found that the purported substituted service on the first ancillary defendant was not in accordance with the terms of the order for substituted service, and for these reasons ruled that the judgment against the ancillary defendants could not stand.

[28] Following this reasoning, if failure to comply with an order for filing and service of the ancillary claim rendered it defective, equally, an ancillary claim that is made contrary to the rules, and not having been filed and issued, is defective and it would mean that there is no such claim before the court. The defect in the present case is even more severe than that of the **Kendrick Scarborough** case, and is a question of whether the claim was instituted by being properly filed and issued on the e-portal. This case also refutes Geest's assertion

¹¹ SVGHCVP2011/010.

that by virtue of CPR 18.11(1), a person on whom an ancillary claim form is served becomes a party to the proceedings, if that person is not already a party. Service of a defective claim is not service.

The Effect of the Ancillary Claim not being part of the Amended Defence and Counterclaim

[29] Geest's defence and counterclaim with the ancillary claim form appended was filed on 1st April 2020. Thereafter the defence and counterclaim were amended three times, on 1st February 2021, on 25th February 2021 and on 1st November 2021. The last occasion was with the Court's permission. However, the ancillary claim form was absent from the three amended defences and counterclaims.

[30] In **Adam Bilzerian v Gerald Weiner and Kathleen Ann Weiner**¹², the Court of Appeal took the view that the amended statement of claim did not so much 'supersede' the original statement of claim but rather was 'subsumed' within it. Similarly in **The Attorney General v Allen Chastenet and Kenneth Cazaubon**,¹³ it was held that an amended statement of claim had been overtaken by a further amended statement of claim. Regardless of the terminology used in these cases, what is evident is that the amended document stands as the operative document for consideration by the court. Even if Geest submission that an ancillary claim may be properly filed as part of the defence and counterclaim and not as a separate document, was accepted, it could not be said to be part of the latest amended defence and counterclaim filed on 1st November 2021, which is the effective defence and counterclaim in the matter. There would still be no ancillary claim before the Court.

Is the Ancillary Claim Prescribed?

[31] The ancillary defendants' primary defence is that the ancillary claim is statute-barred and outside the limitation period set by CPR 18.5(1). They aver that Geest's defence and counterclaim to the main claim was filed on 1st April 2020 and the ancillary claim was filed

¹² SKBHC VAP2012/0028 at paras 11-13.

¹³ SLUHC VAP2015/0016 at paras. 143, 146 and 148.

against them on 28th April 2020. They contend that a 28-day period intervened between filing the defence and counterclaim to the main claim and filing the ancillary claim, which exceeds the 14-day limit within which the ancillary claim must be filed from the date of filing the defence. Thus, they aver that both the right and the remedy sought against them are extinguished pursuant to article 2129 of the Civil Code.¹⁴

[32] Geest countered by saying that the ancillary claim is neither statute-barred nor served out of time and submits that service out of time and prescription are totally different concepts. Service is governed by the CPR and prescription is governed by the substantive law contained in articles 2047 *et seq* of the Civil Code. The ancillary claim, being for breach of contract and breach of fiduciary duty, is prescribed by 6 years. Furthermore, a procedural breach of late service does not extinguish a cause of action. As Covid-19 emergency measures suspended time for filing and service of documents, the ancillary claim was not served out of time.

[33] The record does not contain an ancillary claim form filed on 28th April 2020 and the only one which can be found is appended to the Geest's defence and counterclaim. If it could be said to have been filed at all, it would not have been filed out of time, but would have suffered the defect of being served out of time, by non-compliance with CPR18.5, which states that: "*An ancillary claim which may be made without the court's permission must be served on the person against whom it is made within 14 days after the date the defendant files a defence.*"

[34] In passing, it is worth noting that service out of time in breach of the rule does not amount to prescription of a claim such that the right and remedy are extinguished. The CPR provides no such sanction, and one cannot be imported into the rules, without more. The ancillary claims were for breach of contract and breach of fiduciary duty. Under article 2121 of the Civil Code, both causes of action would be prescribed by 6 years, and article 2129 provides that when a cause of action is prescribed under article 2121 it has the effect of extinguishing the right and remedy. Prescription is a statutory right and remedy which stipulates the circumstances in which it applies, and cannot be extended to service under

¹⁴ Cap 4.01 of the Laws of Saint Lucia

the CPR without being expressly stated. These provisions would not apply to service of a claim, under the CPR.

Issue 2 : Did the failure to properly file the Ancillary Claim render it a nullity, which is incurable?

[35] EHL and Geest suggest that the failure to pay the requisite filing fee does render the ancillary claim a nullity, nor is the failure incapable of being cured. Geest says it is merely a procedural irregularity, which the Court has the discretion to put right under CPR 26.9. EHL on the other hand accepts that it is a nullity, but says it is one which can be cured.

[36] The case cited by Mr Fraser suggests, contrary to his submissions, that failure to properly file the ancillary claim renders it a nullity incapable of being cured. Dicta from **Strachan v The Gleaner Company**¹⁵ is instructive where the Board observed that there are some defects in proceedings, which are more than just irregularities that can be either waived by the parties or corrected at the court's discretion, but amount to nullities which if an order is made thereon, entitles a party to have it set aside *ex debito justitiae* (i.e. as of right). Defective proceedings which are well accepted to fall within the class of a nullity include proceedings which have never started at all owing to some fundamental defect in issuing them. In that regard Lord Millet made the following pronouncements:

"[25] The distinction between orders which are often (though in their Lordships' view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside ex debito justitiae. The leading example is Craig v Kanssen [1943] 1 KB 256, where the proceedings were not served on the defendant at all. The Court of Appeal held that the proceedings were a nullity which the defendant was entitled as of right to have set aside..."

[26] In Re Pritchard [1963] 1 Ch 502, 520 ...

¹⁵ supra note 1

Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the Court and those which were so fundamental that they made the whole proceedings a nullity. These included:

(i) proceedings which ought to have been served but which have never come to the notice of the defendant at all;

(ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and

(iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement.

... In re Pritchard itself was an example of the second class; the proceedings had never been started at all. According to Danckwerts LJ, the originating process had no more effect to commence proceedings than a dog licence."

- [37] The facts of **Re Pritchard**¹⁶ are that an originating summons under the Inheritance (Family Provision) Act 1938 was sealed in and issued out of the Pontypridd District Registry instead of the Central Office as required by Order LIV, r 4b. The defendants entered their appearances but did not take objection to the summons issued. The district registrar raised the validity of the summons. The period under the Act in respect of the proceedings expired at that date. According to Order LXX, r 1, non-compliance with any rule of the court did not render any proceedings void, unless the court or judge so directed. The Court of Appeal in these circumstances held that there was no commencement of the proceedings as the originating summons was a nullity since it was not issued out of the Central Office as required under Order LIV, r 4b, which was a mandatory term. It was not a mere irregularity but a fundamental defect, which the defendant could not waive. It was said that Order LXX, r 1 was not applicable and no rule of court provided a remedy for this defect. Thus, the originating summons had never been issued and was a nullity *ab initio*, as the action was commenced by an originating summons, which was purely a creature of the Rules of the Supreme Court. As the summons was not issued in accordance with the only relevant rule, Order 54, r. 4B, this constituted a fundamental failure to comply with the requirements of section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925,

¹⁶ [1963] Ch 502

relating to the issue of civil proceedings; and the court had no power under R.S.C., Ord. 70, r. 1,1 to cure proceedings which were a nullity.

[38] The other cases cited by Mr Fraser are distinguishable, on the basis that they did not concern fundamental defects which went to the existence of the claim or the validity of the proceedings. They were generally minor matters concerning for example, non-compliance with the time stipulated for making an application, which the rules specifically say can be cured¹⁷. In **Texan Management Ltd.**, on appeal to the Privy Council, the relevant issue was whether CPR r.9.7(4) requires that the evidence in support of the application must be filed at the same time that the notice of application is filed, and, if so, whether failure to file means that the application is a nullity, or whether the court has power to excuse or cure non-compliance and if so, whether the power should be exercised. The Board held that there was a valid application for a stay, and the Court of Appeal was wrong to find that because no evidence was filed with the application, there had been no valid application. The Board ruled that there was a minor procedural defect in not serving the evidence with the application, and the judge below had properly exercised her discretion to excuse it. That case is distinguishable from the present, as where there is in fact no valid ancillary claim issued here.

[39] I therefore conclude that the failure to file the ancillary claim form in accordance with the rules is a fundamental defect, with had the effect of the claim never having been filed and issued, and as a result the proceedings never started at all. This renders the whole of the proceedings a nullity, and the Court has no power under CPR 26.9 to cure proceedings which are a nullity.

Is CPR 9.7 applicable here, for finding that the ancillary defendants have submitted to the Court's jurisdiction despite the defect, and the claim cannot be questioned by the Court or the parties at this time?

¹⁷ Kevin West et al v Shamrock Industries Ltd et al [2015] UKPC 46; Texan Management Limited et al v Pacific Electric Wire and Cable Company Limited [2009] UKPC 46;

[40] The court in **Strachan v The Gleaner Company Ltd.** examined the position not only where the validity of the proceedings is challenged but where the proceedings are valid and there is a defect that goes to the question of the court's jurisdiction. Even in respect of the latter, such defect could not be waived by the parties or otherwise overlooked. Lord Millet observed:

"[27] In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity...

[28] An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.

...

[31] ... In Hip Hing Timber Company v Tang Man Kit and Foo Tak Ching [2004] 7 HKCFAR 212; [2005] 1 HKLRD 572 a two man Court of Appeal, being assured by counsel for both parties that the order under appeal was an interlocutory order, heard and allowed an appeal. On further appeal to the Court of Final Appeal, that Court expressed concern that the judge's order may have been a final order, in which case, in the absence of the prior written consent of both parties, a two man Court of Appeal would have had no jurisdiction to determine the appeal. Before the Court of Final Appeal counsel for both parties sought to waive the defect and argue the appeal on its merits without going into the difficult question whether the judge's order was interlocutory or final. The Court refused to take this course. I said:

"An order of the Court of Appeal, if not properly constituted, is a nullity. It is, of course, a proper ground of appeal that the court from which the appeal is brought had no jurisdiction to make the order in question; but if that is found to be the case the court hearing the appeal has no jurisdiction to determine the appeal on its merits but is bound to confirm the position by setting aside the order below as a nullity.

....

35. The parties cannot confer on us by consent a jurisdiction which we do not possess, and since the issue goes to our own jurisdiction then, contrary to the advice given to the parties by the Court of Appeal . . . we are bound to enquire into it whether the parties raise it or not."

In the event the Court of Final Appeal held that the original order was a final order from which a two man Court of Appeal had no jurisdiction to hear an appeal, and set aside its order."

- [41] Additionally, the Privy Council in **Texan Management Ltd.**, affirmed that the court always had inherent jurisdiction to control its proceedings and that such inherent jurisdiction has not been ousted or curtailed by the advent of the CPR. It is only that it ought not to be exercised where it is plainly inconsistent with rules.¹⁸
- [42] The Court is not only entitled but duty bound to enquire into this question of jurisdiction, pursuant to its inherent powers to control its process and is not precluded from doing so by CPR 9.7. If a defect becomes apparent before the case proceeds to trial, the Court is obligated to enquire and make the appropriate order beforehand to strike out or dismiss the claim. In these circumstances CPR 9.7(5) cannot be used to grant a jurisdiction which the Court does not possess. This is the only course which would operate in the interest of justice, and further the overriding objective by dealing with the case expeditiously, to avoid wasting further court time and resources. It is well-known and accepted that courts are loath to make futile orders, which would be the case here, if the ancillary claim proceeds to trial and judgment is given in these circumstances.

Issue 3 : What should be the fate of the Ancillary Defendant's Counterclaims?

- [43] CPR 18.6 provides that a counterclaim may survive a claim, and allows a defendant to continue a counterclaim if the court gives judgment on the claim for the claimant, and does not dismiss the counterclaim, or where the claim is stayed, discontinued, or dismissed. The provision refers only to a defendant and not to an ancillary defendant, and the terms are also defined differently in the CPR. The notable absence of reference to the counterclaim of an ancillary defendant suggests that it is not intended that the counterclaim of an ancillary defendant should survive the ancillary claim. This is logical considering the possibility that the counterclaim to the ancillary claim may have little to do factually, with the main claim.

¹⁸ Supra note 2 at para 73 of the judgment.

- [44] In relation to bringing and/or maintaining an ancillary claim itself, a primary consideration is the proximity between the main claim and the ancillary claim. CPR 18.10 addresses the matters the court must consider when deciding whether to dismiss an ancillary claim, or permit one to be made, or require that it be dealt with separately from the main claim.
- [45] Accepting that CPR 18.6 does not expressly provide for the survival of the counterclaim of an ancillary defendant, the counterclaim of an ancillary defendant will automatically fall away once the ancillary claim is struck out. Even if the Court may have some discretion in the matter, this is an appropriate case in which the counterclaims should be dismissed, as they share no proximity with the main claim. In respect of the first ancillary defendant, it concerns unpaid salary and expenses incurred on behalf of Geest in carrying out his work. In respect of the second ancillary defendant, it concerns outstanding legal fees for legal services provided. The main claim is for damages for breach of an unrelated contract between EHL and Geest as the defendant. There is therefore no connection between the counterclaims to the ancillary claim and the main claim. Ultimately, these are matters which should best be ventilated in a separate claim between Geest and the ancillary defendants.

The Court's ability to raise the issue of the validity of the Ancillary Claim of its own Initiative?

- [46] I address this issue briefly, in relation to Geest submission that the ancillary defendants never raised the issue and it was not part of their pleadings. The general rule is that a party is bound by its pleadings and a judge ought to decide a case on the basis of the pleadings filed. It is also true that a judge ought not to resolve an issue that was not raised without the benefit of arguments on the point. The legal authorities continue to emphasis the importance of courts taking a neutral stance and adjudicating only the pleaded case.¹⁹

¹⁹ SKBHCVP2016/0015 - South East Asia Energy Holding AG v Hycarbex-American Energy Inc at paragraphs 31-34; ANUHCVP2011/0023 - George W. Bennett Bryson's & Co. Ltd. v George Purcell at paragraphs 30-40.

[47] This is not a case in which this Court is seeking to disregard the parties' pleadings and to determine the matter on a different cause of action or defence which is not pleaded, which is entirely different to circumstances where pleadings are not properly before the court. As the ancillary claim amounts to a nullity, it means the proceedings never commenced and there are no pleadings on which the case may proceed. In such a case the law must be applied justly in relation to all the parties. The Court is not bound by the deficient pleadings, and is well placed to raise the issue provided the parties are informed and given an opportunity to respond²⁰.

Conclusion

[48] The ancillary claim ought to be struck out as it has not been properly filed, issued and made, by including it as part of the defence and counterclaim. This defect is compounded by the fact that it does not appear in any of the subsequent amended defences and counterclaims, the latest of which was filed on 1st November 2021, and is the effective defence and counterclaim in the matter. Thus, the ancillary claim is a nullity which is incapable of being cured, and in reality it was never instituted and the ancillary proceeding never commenced. Once it is struck out the defences will automatically fall away. The counterclaims are ill-suited to be heard as part of the main claim as they share no proximity to it and should also be struck out. It is not that the case is being decided on a cause of action or defence not pleaded, but on a matter which goes to the existence and validity of the claim, and the entire ancillary proceedings.

[49] I therefore make the following orders:

1. The ancillary claim is a nullity and is struck out.
2. The defences and counterclaims of the ancillary defendants are struck out.

²⁰ See also CPR 26.2

3. There is no order for costs.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]


Registrar