

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. NEVHCV 2019/0025

BETWEEN:

MARIE CLAIRE PAVER

Claimant

and

CAMERON AARON

1st Defendant

and

JAVINCIA BIRCH

2nd Defendant

and

ISLANDER WATER SPORTS LIMITED

3rd Defendant/1st Ancillary Defendant

and

WINCENT PERKINS

4th Defendant

and

NEVIS PEAK HOLDINGS LLC dba FOUR SEASONS RESORTS

5th Defendant/1st Ancillary Claimant

and

FOUR SEASONS HOTELS LIMITED

6th Defendant/2nd Ancillary Claimant

and

NEVIS AIR AND SEAPORT AUTHORITY

2nd Ancillary Defendant

Appearances:

Ms. Farida Hobson for the 2nd Ancillary Defendant/Applicant
Mr. Garth Wilkin for the 5th and 6th Defendants/1st and 2nd Ancillary
Claimants/Respondents

2020: November 9
December 14

RULING

- [1] **GILL, M.:** This is the court's decision on an application by the second ancillary defendant to strike out the ancillary claim against it on the ground that the ancillary claim is an abuse of process as being statute barred.

Background

- [2] The original claim was filed on February 18, 2019. The claimant, Marie Claire Paver, brought a fatal accident/wrongful death suit against the six defendants as intitled seeking damages for negligence in relation to the death of her son after he was struck by a boat while he was swimming in waters near the Four Seasons Hotel in Nevis. The alleged incident occurred on February 24, 2018.
- [3] On June 28, 2019 the fifth and sixth defendants ("Four Seasons") filed an ancillary claim against the Nevis Air and Seaport Authority ("NASPA") seeking indemnification or contribution against the third defendant/first ancillary defendant and NASPA.
- [4] On August 7, 2019 NASPA filed a defence to the ancillary claim denying liability in relation to all allegations of negligence, and also pleading a limitation defence.
- [5] On July 10, 2020, NASPA filed the instant application seeking to strike out the ancillary claim against NASPA. The application is made pursuant to Rule 26.3(1)(c) of the Civil Procedure Rules 2000 as amended (CPR 2000) on the basis

that the ancillary claim is an abuse of the process of the court as it is statute barred.

Issue

- [6] The court must determine whether the ancillary claim against NASPA is statute barred and should be struck out as an abuse of the process of the court.

The law

- [7] Part 26.3(1) of CPR 2000 empowers the court to strike out a statement of case in enumerated circumstances. The relevant provision reads:

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 –

...

(c) the statement of case or the part to be struck out is an abuse of the process of the court....

- [8] In **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**,¹ Barrow JA (Ag.) as he then was, noted that the textbook examples given of abuse of process include issuing a claim after the expiry of the limitation period.

- [9] Section 79 of the Nevis Air and Sea Ports Authority Act, Cap 8.05 of the Laws of Saint Christopher and Nevis ("the Act") reads:

79. Where, after the commencement of this Act, any action or other legal proceedings is commenced against the Authority for any act done in pursuance or execution or intended execution of this Act or the regulations or of any public duty or authority imposed or conferred by this Act or any regulations, or in respect of any alleged neglect or default in the execution of this Act or the regulations, or of any such duty or authority, the following provisions shall have effect notwithstanding anything contained in any enactment, that is to say –

(a) the action or legal proceeding shall not be commenced until at least one month after written notice containing the

¹ Civil Appeal No. 6 of 2002, at paragraph 35 of the judgment

particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the General Manager by the plaintiff or his or her agent;

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default or damage complained of, or in the case of a continuing injury or damage within six months next after the cessation thereof.

NASPA's submissions

- [10] NASPA submits that in breach of section 79(a) of the Act, there was no written notice served by Four Seasons on NASPA or any agent of NASPA. Further, in breach of section 79(b), the time to bring an action against NASPA has expired as the alleged act, neglect or default took place on February 24, 2018. The ancillary claim was filed on June 28, 2019 more than twelve months after the incident so that Four Seasons is statute barred from bringing the ancillary claim against NASPA. NASPA points out that in the ancillary claim, Four Seasons relies on the Act and alleges that NASPA is statutorily liable for any act, omission or default of the general manager, yet Four Seasons wishes to ignore section 79 of the same Act on the issue of the limitation period. NASPA contends that by not responding to NASPA's defence to the ancillary claim, which pleads the limitation defence, Four Seasons has accepted that they are indeed out of time to bring the ancillary claim against NASPA.

Four Seasons' submissions

- [11] Four Seasons is of the view that its ancillary claim is not an abuse of the court's process as it is not statute barred, and therefore should not be struck out. It submits that section 79(a) is not a limitation provision that bars a claim but that it is a statutory procedural rule at its highest. It refers the court to CPR 26.9(2) which states that "[a]n error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders." Therefore, it contends, failure to provide written notice to NASPA of its ancillary claim does not invalidate the claim nor

does it bar Four Seasons from issuing or prosecuting its claim. Further, Four Seasons submits that the ancillary claim cannot be considered “an action or proceeding” for the purposes of section 79(b) because it is not an independent claim. The instant ancillary claim does not exist unless the originating claim was brought. It contends that section 79(b) was never intended to apply to such indemnity or contribution ancillary claims so that there is no clear, plain and obvious statutory limitation to the ancillary claim. Four Seasons further submits that there is no acceptance by Four Seasons of NASPA’s limitation defence, tacitly or otherwise, by not filing a reply to NASPA’s defence to the ancillary claim. It posits that filing a reply is an option, not a requirement to a limitation or other defence.

Discussion and analysis

- [12] Both sides are *ad idem* that in order to succeed in its application, NASPA must establish a clear limitation defence. NASPA referred to the judgment of the Court of Appeal of Jamaica in **Bertram Carr v Von’s Motor & Company Ltd**² in which Brookes JA stated:

“In determining that issue it must be borne in mind that the defence that a limitation period has expired is a procedural defence. It is normally one that has to be raised as a defence and resolved at a trial. If the defence is pleaded, it is open to the defendant, in a clear case, to apply to have the claim, or the affected part thereof, struck out as being an abuse of the process of the court.”

- [13] NASPA submits that the case at bar is one such clear case. Learned counsel for NASPA, Ms. Hobson, told the court that it could not be clearer and in the circumstances, the court ought to strike out the ancillary claim against NASPA as an abuse of the process of the court.

- [14] NASPA relies on the first instance decision of the learned master in **Hazeline Maynard and Donasha Wattley v Oliver Maynard and The Saint Christopher**

² [2015] JMCA App 4, at paragraph 11 of the judgment

and Nevis Solid Waste Management Corporation³ to illustrate the exercise of the jurisdiction in our local courts in striking out matters as an abuse of the process of the court with regard to the expiry of a limitation period. In that case, the court applied the Public Authorities Protection Act (PAPA), which stipulated a six-month limitation period for the commencement of a claim against a public authority. The learned master, while lamenting “the evident hardship created by the operation of the PAPA...”, felt compelled to do so and struck out a statement of case in a fatal accident action. NASPA submits that this authority falls squarely in line with the circumstances in this case and therefore, this court is bound to follow the decision and strike out the case at bar against NASPA. In conducting my own research, I discovered that this decision was overturned in its entirety on appeal. This is discussed later at paragraph 18.

- [15] Four Seasons relies on the authorities in this jurisdiction and others laying down that the court’s nuclear power to strike out should be used only in exceptional circumstances, and not where the argument between the parties involves a substantial point of law which does not admit a plain and obvious answer. ⁴ It cited the judgment of the Court of Appeal in **Myrna Norde v Jacqueline Mannix**⁵ in which Carrington JA (Ag.) highlighted the relevant principles when he stated:

“In *Citco Global Custody NV v Y2K Finance Inc*, this Court emphasised that the jurisdiction to strike out should be used sparingly and in *Tawney Assets v East Pine Management Limited et al* striking out was described as a drastic step which is only to be taken in exceptional cases. This is more so where the ground for striking out is that the claim is an abuse of the process of the Court, which is an extremely serious allegation in light of the general right to access to justice....

The question here to be determined applying a broad merits approach is whether the impugned party’s conduct in bringing the claim or prosecuting it amounts to an abuse of process. This is an issue to be determined on evidence unlike the alternative ground for striking out that there is no reasonable ground for bring the

³ SKBHCV2013/0304

⁴ See Dr. Martin Didier et al v Royal Caribbean Cruises Ltd. SLUHCVP2014/0024

⁵ ANUHCVP2015/0034, at paragraphs 5 and 6 of the judgment

claim which is determined by reference to the impugned statement of claim only. Well recognised examples of abuse of process are where a party seeks to relitigate a matter that is res judicata or where he seeks to mount a collateral attack on a previous decision of the court or where two or more proceedings are brought in respect of the same subject matter which can amount to harassment of the defendant or the claim is one which no reasonable person could properly treat as bona fide and contend that he had a grievance which he was entitled to bring before the court or where there is a clear limitation defence to the claim. This is not an exhaustive list.”

- [16] Four Seasons argues that on the authority of the Privy Council in **Alves v The Attorney General of the Virgin Islands**,⁶ provisions such as section 79(a) and (b) of the Act must be “restrictively construed”, and should not be interpreted to apply to ancillary claims for indemnification or contribution made in the same proceedings. It posits that the ancillary claim did not “commence” the captioned action or legal proceedings; the claimant’s claim did. Further, it maintains that the ancillary claim is non-existent without the original claim, as it cannot be brought independently.
- [17] The Limitation Act, Cap.5.09 is cited as noteworthy. Four Seasons directs the court’s attention to section 27 which provides that “any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded”. It contends that the main limitation statute therefore contemplates that counterclaims, in the broadest sense of the word, can be brought once the original claim was filed within the limitation period.
- [18] As mentioned earlier, the decision in the **Hazeline Maynard** case⁷ was overturned on appeal.⁸ The pronouncements of Pereira CJ at paragraph 30 of the judgment of the Court of Appeal are instructive. Her Ladyship stated:

⁶ [2017] UKPC 42, at paragraph 34 of the judgment

⁷ Supra at note 3

⁸ SKBHC VAP2015/0006

“Before concluding, I make this general observation in respect of the application as was made herein to strike out the claim. While I note the statement of Barrow JA [Ag.] in **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited** to the effect that the issuance of a claim after the expiration of a limitation period could amount to an abuse of process as contemplated under CPR 26.3, this certainly should not be taken as suggesting that in every claim where there is an assertion that the claim is statute barred this automatically translates to being an abuse of process in respect of which the nuclear weapon of striking out should be deployed. It is well established that the resort to striking out is a draconian step, ordinarily of last resort and one which should be exercised with caution. Also, I entertain grave doubt as to whether such an application is appropriate where a defence of limitation is raised save in the clearest of cases. The question as to whether a claim is time barred can be in and of itself fact sensitive and thus not at all suitable for this approach but should be left for trial.”

[19] The alleged incident occurred on February 24, 2018. The original claim was filed on February 18, 2019, that is, six days short of twelve months. Based on NASPA's submissions, in order for Four Seasons to file a viable action in compliance with section 79(b) of the Act, the ancillary claim should have been filed within that six-day period. In that scenario, adherence to section 79(a) to serve NASPA's general manager or agent a notice one month prior to filing the ancillary claim would have been impossible.

[20] Four Seasons could not have brought the ancillary claim until it was sued by the claimant. To my mind, if the twelve-month limitation period applies, then Four Seasons or any other potential ancillary claimant would be, in effect, ousted of the right to bring what that party believes is a legitimate and/or necessary claim to secure that party's interests. A party in the situation of being served with a claim barely within a statutory time limit of a law under which it can seek relief from a potential ancillary defendant, would be at a serious disadvantage through no fault of that person or entity. Therefore, it begs the question – does the limitation period under the Act apply in the case of an ancillary claim? In my view, notwithstanding the absence of a specific provision making that exception, the regime under the Limitation Act in relation to counterclaims and set-offs is to be preferred so as to

avoid an apparent absurdity. Simple logic dictates that the date of the filing of the original claim should suffice as the commencement of these proceedings with the ancillary claim being filed in the same proceedings.

[21] In light of the foregoing, I cannot conclude that NASPA has a clear limitation defence. The arguments in relation to the application of the limitation provisions to an ancillary claim do not admit a plain and obvious answer. The issue should be properly ventilated at trial. NASPA has pleaded the limitation defence in addition to its denial of the allegations in the ancillary claim. I am of the view that it would be inappropriate to strike out the ancillary claim at this stage given the serious question raised on a substantial point of law.

[22] Moreover, Four Seasons questions the constitutionality section 79(a) and 79(b) of the Act. Learned counsel Mr. Wilkin submits that if these provisions are interpreted to be a bar to a claim such as Four Seasons' ancillary claim, then they are unconstitutional, being inconsistent with the fundamental rights contained in section 10(8) of the Constitution of Saint Christopher and Nevis, Cap. 1.01 (the fair hearing clause). Counsel contends that it cannot be reasonably justifiable in our democratic society (nor proportional) for a person or entity to be prevented from bringing an indemnification or contribution action against a public authority because it did not first write to the general manager, and when the underlying claim was brought before the limitation period expired. This court leaves these arguments to be dealt with by a court of competent jurisdiction on a proper motion.

Conclusion

[23] This is not a proper case for the exercise of the nuclear option to strike. The issue of whether the limitation period applies to this ancillary claim needs to be ventilated at trial.

Order

[24] Based on the foregoing, it is ordered as follows:

- 1) The application to strike out the ancillary claim is refused.
- 2) Costs shall be costs in the cause.

Tamara Gill

Master

By the Court

Registrar