

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No: BVIHCV2019/0075

BETWEEN:

LORNA HOSPEDALES

(As Administratrix of the Estate of Emanuel Phillip Thomas, deceased)

Claimant

and

ANTHONY CHELTENHAM

(dba POLARIS ENTERPRISES)

Defendant/ Ancillary Claimant

and

REYNOLD PHILLIPS

Ancillary Defendant

Appearances: Ms. Marie Lou Creque of Counsel for the Claimant

Ms. Daisy Bovingdon holding papers for Gerard Clarke of Counsel for the Defendants

2020: March, 4 & 30

JUDGMENT

Introduction

[1] **SANDCROFT, M. [Ag.]**: This is an application dated 13th September 2019 by the defendant seeking leave to file an ancillary claim against Mr. Reynold Phillips (the "**Ancillary Application**"). This application was made at the Case Management Conference stage.

Background/Chronology

- [2] The Ancillary Application was originally brought jointly by the defendant and Caribbean Insurance Limited, who was the second named defendant in the claimant's amended statement of claim. After the Ancillary Application was filed however, the claimant filed a notice of discontinuance on 4th December 2019, confirming her abandonment of the claim against Caribbean Insurance Limited. Consequently, the Ancillary Application is now advanced by the Defendant only.
- [3] The Order of Drysdale, M., dated 11th November 2019 required the claimant to file and serve an affidavit in response to the Ancillary Application on or before 26th November 2019. The Claimant has failed to file and serve any affidavit; therefore, the Ancillary Application is being treated as unopposed by the claimant.
- [4] On March 22nd 2016, the Deceased attended, at Belle Vue, Tortola (the "Premises"), premises owned by Mr. Reynold Philips ("Mr. Phillips"), with Anthony Cheltenham ("Mr. Cheltenham"), owner of a white 2007 550 Ford Wrecker Truck (the "Truck").
- [5] Mr. Cheltenham and the Deceased attended the Premises with Mr. Philips in order to remove a Morris Mini-Moke PV 2620 (the "Mini Moke").
- [6] Ms. Lorna Hospedales (the "claimant") is the sister of Emanuel Phillip Thomas (the "Deceased"), and was awarded Letters of Administration for the Estate of the Deceased.
- [7] It is alleged by the Claimant, in her amended statement of claim that the Deceased was involved in a vehicular accident which resulted in the death of the Deceased.

Defendant's/Applicant's Submissions

- [8] Attorney-at-Law for the defendant, Mr. Gerard Clarke, stated that the law pertaining to the making of ancillary claims is set out within Part 18 of the **Eastern Caribbean Supreme Court Civil Procedures Rules, 2000** (the "**CPR**"). The defendant relies on the content of the ancillary claim form filed on 13th September 2019, together with the supporting affidavit of Ms. Anneka Williams dated 1st October 2019.
- [9] Mr. Clarke submitted that the defendant had complied with the provisions of Part 18 in respect of the making of ancillary claim applications and now seeks leave of the court to proceed with the same. In considering whether to permit an ancillary claim to be made, or to require the ancillary claim to be dealt with separately from the claim, he further submitted that the Court must have regard to all the circumstances of the case, including the factors set out in Rule 18.10(2) of the CPR.

[10] Mr. Clarke also posited that the court determines the matters contained in the claim form and amended statement of claim, not only between the claimant and the defendant, but also between the claimant and the proposed ancillary defendant, Mr. Reynold Phillips, and between the defendant and Mr. Reynold Phillips.

[11] Mr. Clarke submitted that Mr. Phillips was the driver of the Mini Moke on March 22nd 2016, at the time of the incident in which the Deceased was injured, and that the Deceased was struck by the Mini Moke.

[12] Mr. Clarke further submitted that pursuant to the Ancillary Claim the applicants sought relief against Mr. Phillips, that he was liable to pay or contribute to any damages awarded against the Applicants in favour of the claimant.

[13] The Court notes that paragraphs 9-11, (inclusive) of Ms. Williams' affidavit, sets out the connection between the claim and the ancillary claim, the similar nature of the remedy being sought by the defendant, and that the facts of the ancillary claim are substantially the same or closely connected with the facts of the claim.

Issue

[14] The issues for consideration are:

- (i) whether the cause of action in the ancillary claim is dependent upon the determination of the main claim, such that the ancillary claim must be determined separately from and subsequent to the main, and whether the ancillary claim is statute-barred; and
- (ii) whether permission should be granted for the ancillary claim to be made and for Mr. Reynold Phillips to be added as an ancillary defendant.

Law and Analysis

[15] The Ancillary Application is based on the provisions contained in Part 18 of the CPR, which relate to counterclaims, ancillary claims and other similar claims. It is therefore necessary to set out the relevant provisions.

[16] Rule 18.1 defines an ancillary claim to include a counterclaim by a defendant. It states:

- (1) An “ancillary claim” is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes a —**
- (a) claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and**

- (b) claim by an ancillary defendant against any other person (whether or not already a party; and**
- (c) counterclaim by a defendant against the claimant or against the claimant and some other person.**

[17] Thereafter, the Rules proceed to make provisions for ancillary claims and therefore, by the definition in Rule 18.1, counterclaims as well.

[18] Rule 18.2 provides that an ancillary claim is to be treated as if it were a claim for the purposes of the Rules. However Rules 8.12 and 8.13 (which deal with the time within which a claim may be served), Part 12 (which deals with default judgment) and Part 14 (which deals with judgment on admission, subject to exceptions), do not apply.

[19] Rule 18.9 permits a person against whom an ancillary claim is made to file a defence, and further provides that the period for filing the defence is 28 days after the date of service of the ancillary claim. Rule 18.9(3) states that the rules relating to a defence to a claim apply to a defence to an ancillary claim except, as mentioned in Rule 18.2, Part 12 (default judgments).

[20] In the **Editorial Introduction to Part 20 of the UK CPR**¹, commonly referred to as the “White Book”, which deals with counterclaims and other additional claims, it is stated that the best known form of an additional claim is in “the form of a claim made against the claimant by the defendant.” This is known as a counterclaim.

[21] However, as an example of other additional claims, which represent ancillary claims in our Rules, the **White Book** states:

“Another example of an additional claim procedure is the procedure that caters for the situation where, in response to the claimant’s claim, the defendant (whilst perhaps admitting liability in whole or in part) in effect points their finger at a third party alleging that they are obliged to indemnify them for any liability to the claimant, or to contribute to the satisfaction of any judgment.”

[22] CPR 18.4 sets out the procedure for making an ancillary claim and states:

- (1) A defendant may make an ancillary claim (other than a claim falling within rule 18.3) without the court’s permission if in –**
 - (a) the case of a counterclaim – it is filed with the defence; or**
 - (b) any other case – the ancillary claim form is filed before the case management conference.**

¹ (White Book, Volume 1, 2014)

(2) Where paragraph (1) does not apply, an ancillary claim may be made only if the court gives permission.

(3) An application for permission under paragraph (2) may be made without notice unless the court directs otherwise.

(4) The applicant must attach to the application a draft of the proposed ancillary claim form and ancillary statement of claim.

(5) The court may give permission at the case management conference.

(6) The court may not give permission after the first case management conference to any person who was a party at the time of that conference unless it is satisfied that there has been a significant change in circumstances which became known after the case management conference.

[23] The CPR is very clear as to when no permission is needed to file an ancillary claim. It specifically exempts the situation where a defendant (under Rule 18.3) is claiming contribution or indemnity from a co-defendant; and the situation where a defendant is being added as a defendant to a counterclaim (under Rule 18.4).

[24] It must however be noted that the factors listed in the above rule are not exhaustive. In accordance with the overriding objective of dealing with cases “justly”, the CPR has provided that, so far as is convenient, all issues between the parties should be resolved together. This would obviously save time and costs by avoiding multiplicity of claims and the risk of irreconcilable judgments.²

[25] It would seem to me also that the fact of having to seek permission to institute an ancillary claim after case management conference, cannot extinguish the right to bring such a claim where it arises under common law or otherwise. Further an examination of Rule 18.10 would suggest that the Rules, by requiring permission in the specified circumstances, seem to set up a control mechanism in order to filter irrelevant and unconnected ancillary claims, in furtherance of the overriding objective of saving expense, dealing with cases justly, and ensuring that cases are dealt with expeditiously and fairly. This is clearly demonstrated by the Rules when it invites the court to adhere to certain criteria when deciding upon applications pertaining to ancillary claims:

18.10 (1) This rule applies when the court is considering whether to –
(a) dismiss an ancillary claim;
(b) permit an ancillary claim to be made; or

² See Blackstone's Civil Practice, 2010, page 391.

(c) require the ancillary claim to be dealt with separately from the claim.

- Rules 26.1(d) and (e) deal with the court's power to decide the order in which issues are to be tried or to order that part of the proceedings be dealt with separately.

(2) The court must have regard to all the circumstances of the case including–

(a) the connection between the ancillary claim and the claim;

(b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;

(c) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings –

(i) not only between the existing parties but also between existing parties and the proposed ancillary claim defendant;

or

(ii) to which the proposed ancillary defendant is already a party but also in some further capacity; and

(d) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim.

Issue (i): Whether the cause of action in the ancillary claim is dependent upon the determination of the main claim, such that the ancillary claim must be determined separately from and subsequent to the main, and whether the ancillary claim is statute-barred?

[26] Rule 18.10 of the CPR addresses matters relevant to the question whether an ancillary claim should be dealt with separately from the main claim. It is my view that if an ancillary claim can be dealt with separately from the main claim, the cause of action on which it is based must have already arisen independently of any determination made in the main claim. This is so because a court of law will not treat with a matter if there is no basis for dealing with it. The fact that a counterclaim may be dealt with in circumstances where the substantive action has been dismissed reinforces the point.

[27] The Jamaica Court of Appeal case of **Medical Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson**³, is somewhat helpful. The appeal challenged the decision of Master George (Ag) (as she then was), who refused permission to allow Medical Immunodiagnostic Laboratory Limited to join Timos Trading Limited as an ancillary defendant to the proceedings which had been commenced in the Supreme Court. Master George (Ag) refused permission to file the ancillary claim on the basis that the claim was statute barred.

³ Delivered 3 October 2010 (unreported) Court of Appeal, Jamaica, [2010] JMCA Civ 42

[28] The aforementioned case is relevant because the learned Judges of the Court of Appeal dealt with the cause of action for the proposed ancillary claim as having accrued just like the causes of action in tort and contract cases. In determining how to tabulate time the learned judges made no mention of any dependence on the determination of the main suit.

[29] If it is that the cause of action for an ancillary claim only accrued after the determination of the main suit, then the learned judges would not have considered the question of limitation because Medical Diagnostic would have been well within time. However, in granting permission to issue the ancillary claim, it seems to me that time was counted from when the facts which were necessary to ground the cause of action came into existence.

[30] The issue of when the cause of action of the ancillary claim accrued was also examined in the House of Lords decision of **George Wimpey & Co. Ltd v B.O.A.C**⁴. In **George Wimpey**, Lord Reid seemed to have reasoned that the defendant's action against a third party arose out of the original suit. He enunciated:

“...it is true that they are not liable to the plaintiff directly but Wimpeys could only recover from B.O.A.C because the negligence of B.O.A.C. caused damage to Littlewood.”

Therefore, in his view, the subsequent action was so connected to the original action that time would run from when that cause of action arose.

[31] I find that the ancillary claim is not statute-barred in the circumstances and that time would have started to run from March 22nd, 2016.

Issue (ii): Whether permission should be granted for the ancillary claim to be made and for Mr. Reynold Phillips to be added as an ancillary defendant.

[32] Rule 26.2 also gives the court the authority to exercise its powers on its own initiative. In this context the court's powers under Rule 18.10 are relevant. It should be noted that Rule 18.10 (1) contemplates that the Court will be in a position to permit an ancillary claim to be made, to dismiss the ancillary claim or require the ancillary claim to be dealt with separately from the claim.

[33] I have had regard to all the circumstances of the case, including the factors required by Rule 18.10 (2) which have been set out at paragraph 19 above.

⁴ [1955] A.C 169

- [34] Mr. Clarke submitted that Mr. Reynold Phillips was seated in the driver's seat and should have been controlling his Mini Moke PV260 ("Mini Moke") on 22nd March 2016 at the time of the incident in which Mr. Emmanuel Philips Thomas (the "Deceased") was fatally injured. According to the police report of the incident, the Deceased was struck and injured by the Mini Moke and Mr. Phillips should be solely or at least partly responsible for his death.
- [35] Mr. Clarke also submitted, inter alia, that as the owner or the person in possession of the Mini Moke, Mr. Phillips had permitted it to be in a dangerous condition, stuck in gear and/or with seized brakes, and not having any or sufficient fuel on board when the operation to load it onto the defendant's truck and remove it from the premises commenced.
- [36] Mr. Clarke posited, inter alia, that Mr. Reynold Phillips was negligent in not applying the required pressure on the brakes to ensure that the Mini Moke did not run out of control; and that he failed to stop, steer, or otherwise control the Mini Moke as to avoid it striking the Deceased.
- [37] Mr. Clarke also posited that Mr. Reynold Phillips abandoned control of the Mini Moke, or was thrown out of it, and if the latter, this was because he had negligently failed to fasten a seat belt or otherwise ensure that he would remain in the Mini Moke and in control of the Mini Moke, as it was loaded on to the 1st defendant's truck.
- [38] Mr. Clarke further submitted that in the alternative, as the occupier of the premises on which the incident occurred, Mr. Phillips owed a duty of care to the Deceased and that he failed to exercise care, by allowing the Mini Moke on his premises to be in the dangerous condition described above, and/or by failing to take reasonable steps to ensure the safety of the Deceased whilst he was a visitor to the said premises.
- [39] I find in all the circumstances that the facts which ground the ancillary claim are so closely connected to the original claim that permission ought to be granted for the ancillary claim to be made.

Order

[40] I hereby order as follows:

1. The defendant's application for permission to make an ancillary claim and to add Mr. Reynold Phillips as an ancillary defendant is granted.

2. The defendant/ancillary claimant shall file and serve the ancillary claim form [and statement of claim] on or before April 30, 2020 [in accordance with CPR 18.5(3) and the defendant/ ancillary claimant shall comply with CPR 18.13.]
3. No order as to costs on the application.
3. The defendant/ancillary claimant shall file and serve this order.

Ricardo Sandcroft
High Court Master [Ag]

By the Court

Registrar