

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

ANTIGUA AND BARBUDA

ANUHCVP2019/0038

BETWEEN:

**HAYNES BROWNE
(t/a Browne Brothers Construction)**

Appellant

and

**NEIL SARGEANT
(as Executor of the Estate of Buell Carr, deceased)**

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Gerard St. C. Farara

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. C. Debra Burnette with her, Ms. Mandi A. Thomas for the Appellant
Dr. David Dorsett with him, Mr. Jarid Hewlett for the Respondent

2020: October 2;
November 23.

Civil appeal – Interlocutory appeal – Ancillary claim – Counterclaim – Interpretation of rules 18.2(4)(b) and 18.9(3) of the Civil Procedure Rules 2000 – Default judgment – Whether counterclaimant entitled to default judgment on an undefended counterclaim – Rule 18.6 of the Civil Procedure Rules 2000 – How should a counterclaimant proceed with an undefended counterclaim – Equality of treatment of primary claimant and counterclaimant – Application of overriding objective – Rules 1.1 and 1.2 of the Civil Procedure Rules 2000

The respondent brought proceedings against the appellant in the court below, seeking damages for breach of a construction contract. The appellant filed a defence and counterclaimed against the respondent seeking damages in respect of a loan and interest thereon which were obtained by him to finance part of the construction. The respondent did not file a defence to the counterclaim within the time stipulated by the Civil Procedure Rules 2000 (“CPR”).

When the matter came on for trial, the appellant did not appear to defend the claim or to prosecute his counterclaim. In the absence of the appellant, the learned judge entered judgment on the claim in favour of the respondent but made no determination on the counterclaim. The appellant applied to the court for entry of judgment in default under Part 12 of the CPR, on the basis that the respondent did not file a defence to the counterclaim, and that the counterclaim remained alive and undefended, having not been determined by the learned judge at the trial of the claim. Judgment in default was entered on 8th April 2013. On 27th August 2019, the respondent applied to set aside the default judgment on the basis that the entry of the default judgment was without jurisdiction and contrary to CPR 18.2(4)(b) and 18.9(3) which expressly provide that the provisions of CPR Part 12 on default judgments do not apply to ancillary claims (and therefore counterclaims).

The set aside application was granted by a learned master, on the basis that CPR 18.2(4) and CPR 18.9(3) clearly prohibit the grant of default judgments in counterclaims, and that this Court's decision in **Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank and another** [2003] ECSCJ No. 82, which sanctioned the entry of a default judgment on a counterclaim, was inconsistent with the CPR, decided per incuriam and was therefore not binding.

Being dissatisfied with the learned master's order, the appellant appealed on the basis that the CPR does not provide an avenue by which a counterclaimant may seek and obtain judgment in a manner that is proportionate to the way in which a claimant in the main claim may obtain judgment in default under Part 12; and, that CPR 18.1(1)(c) and 18.2(4)(b) are unconstitutional as the rules impede a counterclaimant's access to the court.

Held: allowing the appeal; setting aside the order of the learned master; restoring the judgment in default of defence entered 8th April 2013 in favour of the appellant/counterclaimant; making no declarations as to the constitutionality of CPR 18.1 and 18.2(4)(d); and ordering that each party shall bear their own costs, that:

1. Where the language of a rule admits of only one interpretation, the court must give effect to that interpretation. However, in cases where the rules are not clear, the overriding objective, is a useful tool, in addition to the general context and purpose of the rules, when the court deals with questions of procedure and interpretation of the rules in cases that are not clear. Though rules 18.2(4)(b) and 18.9(3), on a literal interpretation, prohibit a counterclaimant from obtaining a default judgment under Part 12, these rules do not 'admit of only one interpretation'. Instead, on a proper interpretation of rules 18.2(4)(b) and 18.9(3), in light of the broader context of Part 18 and the overriding objective, a counterclaimant is permitted to obtain judgment in default of a defence under Part 12.

The Attorney General v Keron Matthews [2011] UKPC 38 applied.

2. Rule 18.1 broadly defines ancillary claims as any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence including a counterclaim by a defendant against a claimant. In light of this broad definition,

the court must be careful to ensure that each of the provisions in Part 18 is intended to apply to the particular type of ancillary claim in play in the proceedings. While there is clear and good reason for the strict and literal application of rules 18.2(4)(b) and 18.9(3) to ancillary claims by a defendant against a third-party for contribution or indemnity, there is no rational reason for interpreting the rules in a manner that would create an entitlement in one claimant (the primary claimant) to default judgment under Part 12, and disentitle another claimant (the counterclaimant) from pursuing the same course. Such unequal treatment has no justifiable basis and does not accord with the overriding objective in a case such as this where the status of the claimant and counterclaimant and the remedies sought by the primary claim and the counterclaim are similar. In these premises, the learned master erred in concluding that a counterclaimant is precluded from obtaining judgment in default of defence under Part 18.

Rules 1.1, 1.2, 18.2(4)(b) and 18.9(3) of the **Civil Procedure Rules 2000** interpreted; **Stumore v Campbell & Co** [1892] 1 QB 314 considered; **Michael Lewis Junior and another v Tashena James** [2016] ECSCJ No. 3 considered; **Artemiou v Procopiu** [1965] 3 All ER 539 applied; **Bergan v Evans** [2019] UKPC 33 applied; **Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank and another** [2003] ECSCJ No. 82 considered; **Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 applied.

3. In short, the doctrines of judicial precedent and stare decisis mean that the Court of Appeal is generally bound by its own decisions, and the High Court is to a greater extent bound by those decisions, as an inferior court. While the Court of Appeal's decision in **Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank and another** does not clearly explain the reasoning which underpinned the conclusion that default judgment was available to a counterclaimant, it was simply not open to the learned master to conduct what was essentially a review of the correctness of the decision, and conclude that the decision was decided *per incuriam* and that she was not bound to follow it. The master erred in so doing.

Young v Bristol Aeroplane Company Limited [1944] KB 718 referred.

4. The general rule is that costs follow the event unless the justice of the case demands otherwise. In this case, it is appropriate to depart from the general rule, as the appeal was occasioned primarily by a lacuna in the rules, the fact of the counterclaim provisions having been lumped in with ancillary claims under the CPR, and the failure of the rules to speak clearly to the manner in which a counterclaimant may obtain judgment where no defence has been filed. Neither the parties nor the learned master in this case can be faulted.

JUDGMENT

- [1] **PEREIRA CJ:** This is an interlocutory appeal from the order of a learned master dated 11th December 2019, by which the master set aside a default judgment entered on the appellant's counterclaim on the basis that rules 18.2(4) and 18.9(3) of the **Civil Procedure Rules 2000** ("CPR") do not permit a counterclaimant to obtain default judgment on their counterclaim.

Background

- [2] This matter is of some vintage and has a somewhat lengthy and complex procedural history, including a successful appeal by the appellant, Mr. Haynes Browne, to the Court of Appeal. The relevant background to this appeal however may be shortly stated. The original claimant, Ms. Lena Carr brought proceedings against the appellant, Mr. Haynes Browne, seeking damages for breach of a construction contract. Ms. Carr later died, and her brother, Mr. Buell Carr was added, as her personal representative, to the claim. Following Mr. Carr's death, his executor Mr. Neil Sargeant was substituted as the claimant and is now the respondent to this appeal. Mr. Browne filed a defence and counterclaim to Ms. Carr's claim, seeking damages which represented a loan and interest thereon obtained by him to finance certain stages of the construction. Ms. Carr did not file a defence to the counterclaim within the 28 days stipulated by rule 18.9(2) of the CPR.
- [3] The matter came up for trial before Thomas J on 30th October 2006. On that date, Mr. Browne did not appear at trial to present his defence to the claim or to prosecute his counterclaim. The learned trial judge proceeded to enter judgment on the claim in favour of Ms. Carr with damages to be assessed. The judge however made no determination on Mr. Browne's counterclaim. Mr. Browne subsequently applied to the court for the entry of judgment in default of defence to his counterclaim under Part 12 of the CPR against the background that his counterclaim had not been determined by the learned judge, and no defence had been filed by Ms. Carr to the counterclaim. Judgment in default was entered on 8th April 2013 in the sum of \$19,803.70.

[4] On 27th August 2019, Ms. Carr, by her personal representative, applied to set aside the default judgment on the basis that counterclaims under the CPR are ancillary claims; CPR 18.2(4)(b) and 18.9(3) do not permit the entry of default judgments on ancillary claims; and therefore that the entry of default judgment on the counterclaim was without jurisdiction and contrary to the rules of court.

[5] The matter came before a learned master on 11th December 2019. By order of even date, the master granted the application and set aside the default judgment. Following a summary of the procedural history of the matter, the master reasoned:

“...this Court has analysed the law and the CPR and is of the considered opinion that the default judgment should be set aside for the following reasons:

1. Pursuant to CPR 18.1(1)(c) 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 counterclaim.
2. CPR 18.2(4) and CPR 18.9(3) specifically prohibits the application of default judgments to any ancillary claims.
3. The rules are clear and there is no ambiguity in relation to whether default judgment are capable of being entered on a counterclaim.
4. That the authority of *Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank* and another Civil Appeal 15 of 2003 which decided that a Defendant can obtain default judgment on a counterclaim was decided without any reference to the clear provisions of CPR 18 which prohibit the entry of default judgments in these circumstances. It is therefore inconsistent with the CPR. Therefore I am of the opinion that this authority was decided per incuriam and therefore does not bind this Court.”¹

[6] The master accordingly ordered that:

“1. That the application to set aside the judgment in default of defence of counterclaim is granted.

¹ See Record of appeal pp. 11-12.

2. The judgment in default of defence dated 8th April, 2013 is hereby set aside.

3. No order as to Costs.

4. The Claimant shall have carriage of this Order.”²

The grounds of appeal

[7] The appellant, being dissatisfied with the learned master’s order, has appealed on the following two grounds:

(i) That the learned master erred in law when she failed to apply all of the provisions of Part 1 and Part 18 of the Civil Procedure Rules, in that she failed to consider and apply CPR 1.2 and CPR 18.6 when considering the application to set aside the judgment in default entered on a counterclaim; and

(ii) The learned master erred when she failed to have due regard for the applicant’s right of access to the court when she ordered that the default judgment entered on his counterclaim be set aside without going further to recognise that the appellant is entitled to have a judgment on his counterclaim in the circumstances.

Submissions

[8] Ms. C. Debra Burnette, on behalf of the appellant, has framed the appeal as ‘one turning on the issue of proportionality’. The appellant’s main contention is that the CPR does not provide an avenue by which a counterclaimant, whose counterclaim is undefended, may seek and obtain judgment in a manner that is proportionate to the manner in which a claimant in the main claim (who I shall refer to as the “primary claimant”) may obtain judgment in default under Part 12 of the CPR. The appellant contends that the master erred in merely setting aside the default judgment, and in not going further to enter judgment on behalf of the counterclaimant. The appellant contends that the master ought to have found that CPR 18.6 permits a defendant to continue an undetermined

² See Record of appeal p. 13.

counterclaim; the CPR does not provide for the means by which the counterclaimant may continue their counterclaim in accordance with CPR 18.6; and, given that judgment in default was not available to the counterclaimant by virtue of CPR 18.2(4)(b) and 18.9(3), the master was entitled and ought to have entered judgment on the counterclaim, as it remained live and undetermined.

- [9] The appellant relies on CPR 1.2, which requires the court to give effect to the overriding objective when it interprets any rule, and argues that the master was obliged to consider how to give effect to the provisions of Part 18 so as to do justice to the matter. The appellant further relies on this Court's decision in **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al**,³ wherein Byron CJ held that a defendant can obtain default judgment on a counterclaim at the case management conference stage, in the circumstances where there was no defence to the counterclaim filed by the claimant within the 28 days required by the rules. The master, in giving reasons for her order, expressed the view that this decision was inconsistent with the CPR, decided per incuriam and therefore did not bind her. The appellant argues that the master was in fact bound by this decision and it was not open to her to refuse to follow it on the basis that the decision was, in her view, per incuriam.
- [10] The appellant submits alternatively that CPR 18.1(1)(c) and 18.2(4)(b) are unconstitutional and ought to be struck from the rules. Particularly, the appellant submits that the rules violate the appellant's right of access to the court, which is protected by section 15(8) of the **Constitution of Antigua and Barbuda**,⁴ in the sense that CPR 18.1(1)(c) and 18.2(4)(b) restrict the right of a counterclaimant to apply for and obtain a default judgment on an undefended counterclaim, when in fact his/her counterpart, the primary claimant, stands in a better position. This, the appellant says, is impermissibly disproportionate and unconstitutional. In making this alternative submission, the appellant relies on this Court's decision in **George Blaize v Bernard La Mothe et al**⁵

³ [2003] ECSCJ No. 82.

⁴ Antigua and Barbuda Constitution Order 1981, Cap. 23 of the Laws of Antigua and Barbuda.

⁵ [2012] ECSCJ No. 373.

by which the then CPR 12.13 was declared unconstitutional, resulting in an amendment of the rule.

[11] On these bases, the appellant seeks the following relief on appeal:

- (i) That the appeal be allowed, and the order of the master be varied to include an order for an entry of judgment against the claimant and in favour of the defendant on his counterclaim in the sum of \$19,803.70 together with interest thereon from the 8th April 2013, until payment; and
- (ii) A declaration that CPR 18.1(1)(c) and 18.2(4)(b) as it relates to a counterclaim are unconstitutional.

[12] The respondent accepts that, in accordance with CPR 1.2, the court must seek to give effect to the overriding objective when interpreting any rule, but argues that the overriding objective (as a general provision) cannot be used to defeat the clear wording of CPR 18.2(4)(b) and CPR 18.9(3) which specifically disapply the default judgment regime under Part 12 in these circumstances. The respondent argues that CPR 18.6 clearly provides that the appellant may continue his counterclaim, and that continuation of the counterclaim does not entitle the appellant to entry of judgment forthwith, as argued, or to default judgment under Part 12. The respondent contends that if the appellant desires to continue his counterclaim, he must seek to bring his counterclaim to trial and obtain judgment as is done by other litigants under the CPR who are not permitted to obtain default judgment on their claims. The respondent in essence contends that it is not open to the appellant to obtain a default judgment, but the door is not closed on the appellant, as he may continue the counterclaim by way of trial.

[13] In relation to the constitutionality of CPR 18.1 and 18.2(4)(b), the respondent argues along the same lines outlined above. The respondent argues that the appellant has not been denied his right of access to the court as CPR 18.6 expressly provides that he may continue his counterclaim (by bringing the counterclaim to trial) and that no issue of

access to the court arises. In these premises, Dr. David Dorsett, on behalf of the respondent, contends that while the procedural regime under the rules is not perfect, it is fair – a counterclaimant therefore need not be able to seek and obtain judgment in the same way a primary claimant can.

[14] I move now to consider the relevant rules under the CPR.

Relevant Civil Procedure Rules

[15] Counterclaims are not regulated by their own rules under a discrete Part of the CPR. Counterclaims are instead joined under Part 18 which governs ancillary claims, by virtue of CPR 18.1(1) which defines ancillary claims as including counterclaims. CPR 18.1(1) reads as follows:

- “(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.” (underlining supplied)

[16] ‘Counterclaim’ is not defined by the rules; save possibly, for the brief reference made in CPR 18.1(1) to the fact that a counterclaim may be made against the claimant or against the claimant and some other person. The nature of a counterclaim has remained virtually unchanged throughout the various promulgations of the procedural rules governing civil proceedings in England and the Commonwealth. A foundational expression of the nature of a counterclaim is found in **Stumore v Campbell & Co**,⁶ where Esher MR stated:

“... This Court has determined that, where there is a counter-claim, in settling the rights of parties, the claim and counter-claim are, for all purposes except execution, two independent actions.

⁶ [1892] 1 QB 314.

If the plaintiff sustains his claim, judgment goes for him on that; and if the defendant sustains his counter-claim, judgment goes for him on that. Either claim may be reduced by set-off. But if the plaintiff succeeds in the one case and the defendant in the other, there are two judgments which are independent for all purposes except execution.”

[17] In practical terms, a counterclaim is a claim by a defendant against at least the primary claimant, in circumstances where the defendant has some cause of action against the primary claimant which could otherwise be litigated in separate proceedings. It is a **separate claim** filed in the context of related, existing proceedings, **which was simply filed later in time** to the originating documents which commenced the proceedings. Like a counterappeal, a counterclaim is a separate action or cross-action, independent of the primary action before the court and can stand on its own despite whatever course is taken on the primary action.

[18] The nature of a counterclaim as a separate and independent action, as outlined above, is evidenced in our jurisdiction by CPR 18.6 which provides that ‘[t]he defendant may continue a counterclaim if the – (a) court gives judgment on the claim for the claimant and does not dismiss the counterclaim; or (b) claim is stayed, discontinued or dismissed.’ There is also CPR 18.1 and CPR 18.8 which confirm that a defendant is not limited in his counterclaim, to naming the claimant in the primary claim as a defendant to the counterclaim, and is free to join any other party against whom a cause of action lies, in the same way that an ordinary claimant could.

[19] The rules which are brought into sharp focus in this appeal are CPR 18.2, 18.6, 18.9 and 18.12. CPR 18.2 sets out some of the foundational procedural rules underpinning ancillary claims (and therefore counterclaims). Critically, CPR 18.2(4) and (5) provide:

“(4) The following rules do not apply to ancillary claims –

- (a) rules 8.12 and 8.13 (time within which a claim may be served);
- (b) Part 12 (default judgments); and
- (c) Part 14 (admissions) other than rule 14.1(1) and (2), 14.3 and

(5) If the ancillary claim is a counterclaim by the defendant against a claimant (with or without any other person) the claimant is not required to file an

acknowledgment of service and therefore Part 9 (acknowledgment of service) does not apply to the claimant.”

[20] CPR 18.6 is set out at paragraph 18 above. As already indicated, CPR 18.6 is evidence that a counterclaim is a separate action, independent of the main claim. CPR 18.6 leaves it open to the counterclaimant, if they wish to do so, to ‘continue’ the counterclaim in the event that the court gives judgment on the main claim for the claimant and does not dismiss the counterclaim; or the main claim is stayed, discontinued or dismissed.

[21] CPR 18.9 sets out the requirements for filing a defence to an ancillary claim:

“(1) A person against whom an ancillary claim is made may file a defence.

(2) The period for filing a defence is the period of 28 days after the date of service of the ancillary claim.

(3) The Rules relating to a defence to a claim apply to a defence to an ancillary claim except Part 12 (default judgments).

(4) An ancillary defence must include – (a) a certificate of truth in accordance with rule 3.12; and (b) the ancillary defendant’s address for service in accordance with rule 3.11.”

[22] CPR 18.12 applies to the circumstance where the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time. CPR 18.12 provides as follows at subrule (2) onwards:

“(2) The party against whom the ancillary claim is made –

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim;

(b) subject to paragraph (5), if judgment under Part 12 is given against the ancillary claimant – may apply to enter judgment in respect of the ancillary claim.

(3) Paragraph (2) does not apply in ancillary proceedings against the Crown unless the court gives permission.

- (4) An application for the court's permission under paragraph (3) may be made without notice unless the court directs otherwise.
- (5) The ancillary claimant may not enter judgment under paragraph (2) (b) if the ancillary claimant wishes to obtain judgment for any remedy other than a contribution or indemnity for a sum not exceeding that for which judgment has been entered against the ancillary claimant.
- (6) The court may at any time set aside or vary a judgment entered under paragraph (2) if it is satisfied that the ancillary defendant –
 - (a) applied to set aside or vary the judgment as soon as reasonably practicable after finding out that judgment had been entered;
 - (b) gives a good explanation for the failure to file a defence; and
 - (c) has a real prospect of successfully defending the ancillary claim.”

Discussion

- [23] There is no dispute that the counterclaim was not dealt with by the learned trial judge and that CPR 18.6 was therefore engaged. The appellant's counterclaim remained live and extant, having not been determined, and it was open to the counterclaimant under that rule to 'continue' the counterclaim. There is also no dispute that the respondent, though not required to file an acknowledgment of service to the counterclaim (see CPR 18.2(5)), was required by CPR 18.9 to file a defence to the counterclaim within 28 days of service of the counterclaim, if he wished to defend it. The respondent did not file a defence to the appellant's counterclaim within that period.
- [24] There are, in these premises, two clear legal incidents and presumably consequences in simultaneous operation here: on the one hand, there is the fact that the counterclaim was undefended, and, on the other hand, is the fact that the counterclaim was left undetermined by the judge following a determination on the main claim. I understand the appellant's submissions to bring into focus the first of these incidents. The appellant's complaint is really a challenge to and criticism of the rules on the basis that the CPR does not proportionately treat with undefended counterclaims in the way that it treats with undefended claims for which judgment under Part 12 is available, as there is no express procedural gateway available to a counterclaimant to realise an undefended

counterclaim. This complaint, which is the appellant's main complaint, is entirely independent of whether the primary claim has been determined or not, and therefore independent of any question as to the procedure to be followed under CPR 18.6 which provides for continuation of a counterclaim where the main claim is either determined, stayed, or discontinued. Against that background, the appellant argues that the master was entitled and ought to have entered judgment on the counterclaim forthwith. If such a course was not permitted, it is argued that the rules which enjoin counterclaims under Part 18, and which prevent access by a counterclaimant to default judgment under Part 12, are simply unconstitutional.

[25] Given the narrow nature of the appellant's main complaint, it appears, at the outset, that the solution proposed by Dr. Dorsett in the form of CPR 18.6 (which provides for the continuation of a counterclaim where the main claim has been, determined, stayed or discontinued) is not very helpful. Though Ms. Burnette in her oral submissions also took issue with the lack of express guidance by the rules as to how a counterclaim is to be continued under CPR 18.6, the issue identified by her concerns the legal position of a counterclaimant whose claim is undefended – this issue arises 28 days after the service of the counterclaim and therefore, conceivably in most cases, well in advance of any question under CPR 18.6 as to the continuation of the counterclaim, which only arises after a claim has been determined, stayed or discontinued. The crux of the appellant's complaint is really that an undefended counterclaim lays procedurally in a state of flux, independent of any actions which have been taken on the main claim.

[26] The failure of the rules to expressly prescribe a method by which the counterclaimant may obtain judgment following the failure to file a defence to the counterclaim is a clear lacuna, the effect of which is that the CPR, while permitting a defendant to mount a counterclaim, does not address one of the basic circumstances in which realising that counterclaim may arise. In circumstances where no such clear provision is made, a counterclaimant is essentially made to wait indefinitely without judgment in their favour and left only with the possibility of a judge at the trial of the primary claim making a determination on the counterclaim. Or, if the claim is stayed, dismissed or discontinued

without any determination on the counterclaim, the counterclaimant is made to pursue the avenue under CPR 18.6 of 'continuing the claim', the meaning and practical effect of which is not explained or in any event clear in the context of an undefended counterclaim. The essential concern of this Court against that background is, how ought a counterclaimant to proceed with an undefended counterclaim? With this concern, the further question also arises: why should a counterclaimant whose claim against the primary claimant has gone undefended be subjected to unequal or less favourable treatment than the primary claimant? In essence, is there some rational basis on which the inequality of treatment as between two claimants can be justified?

- [27] The starting point to resolving any issue of this nature must be the overriding objective of the CPR, and the court's role in giving effect to it, which are both set out in CPR 1.1 and CPR 1.2 as follows:

"The overriding objective

1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

- (a) ensuring, so far as is practicable, that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) importance of the case;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application of overriding objective by the Court

- 1.2 The court must seek to give effect to the overriding objective when it –
- (a) exercises any discretion given to it by the Rules; or
 - (b) interprets any rule." (Underlining supplied)

[28] CPR 1.2 and several authorities across this jurisdiction and the Commonwealth Caribbean make plain that the overriding objective is not merely an aphorism or meaningless preamble to the rules. As the learned authors of **Civil Procedure**⁷ noted:

“An important and distinctive innovation of the new rules was the introduction of the overriding objective, this being to enable the court to deal with cases justly. The CPR are not meant to be definitive of civil procedure and, instead, the court is given a discretion in the application and interpretation of the rules to a particular case in accordance with the overriding objective... This is meant to facilitate the operation of the rules in order to do justice in a particular case...”.

[29] The court is clearly enjoined under the CPR to deal with cases in keeping with the interests of justice, taking into account equality between the parties, the expense of litigation, proportionality, expedition and the court’s limited resources. There is no discretion vested in the court to determine whether or not it will give effect to the overriding objective when dealing with cases – the language of the rules mandates the court at all times to be alive to the overriding objective and its effect on the exercise of discretions and in the interpretation of the CPR.

[30] It is also well-known that the overriding objective is not a means by which a party or even the court can avoid clear procedural provisions in the quest to seek a desired outcome. Indeed, as the Privy Council stated in **The Attorney General v Keron Matthews**,⁸ ‘...if the language of the rules admits of only one interpretation, it must be given effect’. The overriding objective, however, is a useful tool, in addition to the general context and purpose of the rules, when the court deals with questions of procedure and interpretation of the rules in cases that are not clear.

[31] Again, the essential concern of this Court is, how ought a counterclaimant to proceed with an undefended counterclaim? In my view, the answer lies in the interpretation of CPR 18.2(4)(b) and 18.9(3), both of which, on their face, prohibit a counterclaimant from accessing judgment in default under Part 12, in the way that a primary claimant could.

⁷ Paula Loughlin and S.M Gerlis, *Civil Procedure* (2nd edn, Routledge 2004) pg. 5.

⁸ [2011] UKPC 38.

While it is accepted, as Dr. Dorsett submitted, that the rules themselves restrict the cases in which judgment in default of defence may be sought and obtained, that there is no right to a default judgment under the rules in all cases, and that the literal meaning of the rule is to deny access by a counterclaimant to default judgment under Part 12, I am not of the view that these rules in the words of the Privy Council in the **Keron Matthews** case ‘admit of only one interpretation’. I instead take the view that the proper interpretation of the rules, in light of the broader context of Part 18, and the overriding objective, permits a counterclaimant to obtain judgment in default of a defence under Part 12.

- [32] This case, as I have already stated, engages the rules of procedure set out under Part 18. Part 18, by way of rule 18.1, clearly joins under the same procedural umbrella ‘any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence’. This includes, but is possibly not to be limited to: (i) any claim by a defendant for contribution or indemnity (presumably in relation to the main claim); (ii) a claim by an ancillary defendant against another person; and (iii) a counterclaim by a defendant against the claimant by themselves or with some other person (not being a claim for set off in a defence). The effect of the broad definition of ancillary claims is that several different types of proceedings are regulated by the same procedural rules, which has the potential to produce absurd results. Indeed, this was the essence of this Court’s observation in the case of **Michael Lewis Junior and another v Tashena James**.⁹ In **Tashena James**, the Court of Appeal considered the scope and applicability of CPR 18.12(2)(a) to counterclaims as a substratum of ancillary claims under Part 18. CPR 18.12 is headed: ‘Special provisions relating to judgment on failure to file defence to ancillary claim’. Subrule (2) states that:

“The party against whom the ancillary claim is made—

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

⁹ [2016] ECSCJ No. 3.

The Court formed the view at paragraph 7 of its judgment that:

“...were the sub-rule to be construed [in the strict and literal sense], it would lead to an absurd result. Rather, it is not contemplated that this sub-rule is to govern the effect of a failure to file a defence as it relates to a claimant and defendant in the main proceedings but is more practically and properly directed to the situation where there is an ancillary defendant in the true sense – that is another party against whom a claim has been made, but who is or was not a party to the main proceedings.”

The Court therefore unanimously held that, against the broad context of Part 18, CPR 18.12(2)(a) was not intended to apply to counterclaims but was intended to apply to ancillary claims by a defendant against a third party.

[33] The **Tashena James** case underscores the need for care when interpreting the rules in general, but particularly Part 18 in light of its applicability to diverse forms of proceedings. In my view, given the state of play obtaining under Part 18, and the issues inherent thereto, as foreshadowed by **Tashena James**, the court must take care to ensure that each of the rules under Part 18 is intended to apply to the particular type of ancillary claim which is in play in the proceedings. Any interpretation given to Part 18 therefore must bear this context in mind, and the learned master was required to assess CPR 18.2(4)(b) and 18.9(3) against this background.

[34] Turning to CPR 18.2(4)(b) and 18.9(3), it appears that there is clear and good reason for the strict and literal application of these rules to “true” ancillary claims by a defendant against a third-party for contribution or indemnity. This is simply that where defendant ‘A’ claims against some third-party ‘B’ for contribution or indemnity in relation to the losses alleged to be occasioned by the defendant arising from the primary claim, the claim by A against B is wholly dependent on A’s liability to the primary claimant. A default judgment in that circumstance would make the third-party, B, liable to the defendant, A, and would not take sufficient account of the dependent nature of the ancillary claim to the primary claim, with the possibility of a judgment being entered on the ancillary claim where there is no judgment to which it relates in the primary claim. Such an outcome makes nonsense of the rules and would not take into account the

nature of third-party ancillary claims as wholly dependent on the primary claim. The same reasoning or concerns do not however apply to counterclaims. The law is clear that counterclaims are themselves claims, capable of subsisting independently of the primary claim. A default judgment entered on a counterclaim would therefore be largely independent of the primary claim. And, while the relationship between a default judgment entered on the counterclaim and the primary claim would be a matter for the court, if a default judgment were to be entered on a counterclaim (if such a question were to arise), there is no absurdity or inherent difficulty caused by the availability of default judgments to counterclaims as there is with third-party ancillary claims.

[35] I would go further to state that there is no rational reason for interpreting the rules in a manner that would create an entitlement in one claimant (the primary claimant) and disentitle another claimant (the counterclaimant) from pursuing the same course. In other words, there is no clear or good reason for which two claimants, albeit on opposite sides of a proceeding, should be treated differently. The fact alone of this difference in treatment is, in my view, incompatible with the overriding objective of doing justice between the parties, in the sense that it does not coalesce with the equal footing, proportionality and saving of expense encouraged by the overriding objective.

[36] To my mind, such unequal treatment which is not grounded on any justifiable basis, is devoid of any rational connection to the objective of having a judgment entered on an undefended counterclaim in similar manner as a primary claimant, and does not accord with the overriding objective in a case such as this where the remedies sought by the primary claim and counterclaim are similar. While it is true that different types of claims, or even claims for different remedies or by different classes of persons, may attract different procedures for well justifiable reasons, I can think of no justification for allowing a primary claimant of no peculiar status to obtain a default judgment for a liquidated sum or damages while depriving a counterclaimant of similar status from obtaining by default similar remedies. Indeed, there is no conflict or difficulty created by treating a primary claimant and counterclaimant in these circumstances, in the same way, and there is no good reason for imputing an intention in the rules to create such an end result.

[37] Dr. Dorsett's oral submissions to this Court raised the possibility of a trial on the appellant's counterclaim. Indeed, this response is representative of the general legal position in all civil actions, which was summarised by Lord Briggs in **Bergan v Evans**¹⁰ as follows:

"[T]he general rule is that, leaving aside judgment in default, a claimant faced with a defective or even non-existent defence still has to prove her case, even though that may typically be achieved in a relatively summary way, and the court may in such circumstance prohibit the defendant, as a matter of discretion, from taking any active steps to resist that part of the claimant's case, whether by cross-examination or the deployment of evidence by way of challenge."

This solution however is not without difficulty.

[38] First, this solution requires the counterclaimant to endure what may be a more costly and time-consuming process which a primary claimant would not endure. Indeed, and as foreshadowed, a counterclaimant is for all intents and purposes a claimant. As I have already stated, there is, in my view, no rational basis for interpreting the rules and the court's role thereunder in a manner that would require one claimant (the counterclaimant) to pursue a more onerous, and possibly more time consuming and more costly means of obtaining judgment in their favour, where the rules do not so burden another claimant (the primary claimant). To sanction such an approach would not be in keeping with the overriding objective.

[39] Second, the unfairness and disproportionality in adopting such a course is taken further when one considers the fact that a defendant in the main proceedings is capable of having a default judgment entered against him/her set aside, but a counterclaimant would not. It is now trite that the overriding objective favours the determination of claims on their merits and a door should not often be closed on a party with a meritorious defence on the basis of a procedural non-compliance. As Byron CJ stated in **Saint Lucia Furnishings**, albeit in a different context:

¹⁰ [2019] UKPC 33.

“The main concept in the overriding objective of the new rules set out in CPR Part 1.1 is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default.”¹¹

Were the rules to be interpreted as wholly disapplying Part 12 from all forms of ancillary claims, potentially meritorious defences are finally shut out once the defendant to a counterclaim fails to file a defence. Any judgment obtained, whether by trial or by whatever means the counterclaimant obtains it, would be final and determinative of the rights claimed as between the counterclaimant and the defendants to the counterclaim. This interpretation of the CPR would seek to prioritise compliance or non-compliance with the rules on the part of a defendant to a counterclaim, over the preference of the rules to have matters determined on their merits. A strict and literal interpretation of CPR 18.2(4)(b) and 18.9(3) in this regard is very much a double-edged sword. In my view, the injustice is palpable and is not solely suffered by the counterclaimant, but also a defendant to the counterclaim.

- [40] In keeping with the overriding objective, the Court is required to be alive to the disproportionate effect of the strict application of CPR 18.2(4)(b) and 18.9(3) in the context of no provision being made for the resolution of undefended counterclaims. Similarly, in interpreting any rules or legislation, the court is required to give deliberate consideration to the reasonableness of outcomes occasioned by the interpretive exercise against the background of all possible interpretations which may be afforded to statutory language. As the English Court of Appeal in **Artemiou v Procopiu**¹² stated, ‘An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available’. This must be all the more so when construing procedural rules which are to be the ‘servant and not [the] master’¹³ of the process in ensuring that parties enjoy equal access to the courts. In similar vein, the Court is

¹¹ Supra, note 3, at para. 11.

¹² [1965] 3 All ER 539.

¹³ See *Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46 per Lord Collins at paragraph 1.

guided by the reasoning of the Privy Council in **Bergan v Evans**, to the effect that the rules ought not to be interpreted to place more onerous responsibilities on either party than is just or necessary in the circumstances. In the context where Part 18 is admittedly broad in scope – i.e. applicable to a number of different substrata of claims under the broad heading of ‘ancillary claims’ – the overriding objective, in my view, requires that CPR 18.2(4)(b) and 18.9(3) are read narrowly to apply to other forms of ancillary claim, to the exclusion of counterclaims which, in a real sense, are not strictly ‘ancillary’ to the claim brought by a claimant against a defendant in the context in which that word is ordinarily understood, even in the context of Part 18 of the CPR.

- [41] In all the above premises, I am of the view that the learned master erred in her interpretation of CPR 18.2(4)(b) and 18.9(3) and therefore in setting aside the default judgment entered in favour of the appellant.
- [42] My conclusion above is dispositive of the appeal, and there is no need to further consider the constitutionality of CPR 18.1 and 18.2(4)(b). I would therefore make no orders on the constitutional relief sought by the appellant. Before concluding however, I shall briefly comment on the learned master’s conclusion that the Court of Appeal decision in **Saint Lucia Furnishings**, in which this Court granted default judgment on a counterclaim, was inconsistent with the CPR, decided per incuriam and therefore that she was not bound by it. Such a line of reasoning was very clearly not open to the learned master.
- [43] The doctrines of judicial precedent and stare decisis remain alive in our courts. What this means in the context of this case, is that the Court of Appeal is bound by its own decisions (save where the well-established principles in **Young v Bristol Aeroplane Company Limited**¹⁴ apply), and the High Court is to a greater extent bound by those decisions as an inferior court. While the Court of Appeal decision in **Saint Lucia Furnishings** does not clearly explain the reasoning which underpinned the Court’s

¹⁴ [1944] KB 718.

conclusion that default judgment was available to a counterclaimant, and could therefore reasonably be criticised on that basis, it was simply not open to the learned master to conduct what was essentially a review of the correctness of the decision of a superior court on the same subject matter and conclude that the decision was decided per incuriam and that she was not bound to follow it. In the circumstances, I certainly do not doubt the correctness of the Court's conclusion in **Saint Lucia Furnishings** and find that the learned master erred in not adopting the approach set out therein.

Conclusion

- [44] It follows from the above that the learned master's order must be set aside, the order having been made on the basis that the CPR does not allow a counterclaimant to obtain default judgment. The application to set aside the default judgment was made on the sole basis that the judge had no jurisdiction to enter default judgment. There was no other basis advanced before the learned master for setting aside the default judgment. The default judgment, in the circumstances, may be restored without more.

Costs

- [45] Lastly, on the issue of costs, the incidence of costs is undoubtedly a matter for the court's discretion. The general rule is that costs follow the event unless the justice of the case demands otherwise. Applying this general rule, the appellant having prevailed in his appeal, would ordinarily be entitled to costs. I note however that though the resolution of this case was dependent on an interpretive exercise conducted by this Court which was entirely open to the master when confronted with the appellant's submissions, my earlier reasoning herein is to the effect that the circumstances which occasioned this appeal are primarily attributable to a lacuna in the rules, the fact of the counterclaim provisions having been lumped in with ancillary claims under the CPR, and the failure of the rules to speak clearly to the manner in which a counterclaimant may realise his/her judgment where no defence has been filed. In my view, neither the parties nor the learned master can be faulted. This leads me to the conclusion that it is appropriate to depart from the general rule that costs follow the event, and I would order that each party bear their own costs.

Order

[46] For all the foregoing reasons, I would order that:

- (i) The appeal is allowed.
- (ii) The order of the master dated 11th December 2019, setting aside the judgment in default of defence entered on 8th April 2013 in favour of the appellant, is set aside.
- (iii) The judgment in default of defence dated 8th April 2013 is hereby restored.
- (iv) For the avoidance of doubt, no declaration is made as to the constitutionality of CPR 18.1 and 18.2(4)(b).
- (v) Each party shall bear their own costs.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar