

EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT & THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2012/0049

BETWEEN:

AVIONNE JOHN

ALICIA JOHN

Claimants

and

DICK OFFICE MACHINE SERVICES LTD

1st Defendant/ 2nd Ancillary claimant

REYNOLDS DICK

2nd defendant / 2nd Ancillary claimant

SAINT VINCENT BREWERY LTD.

3rd Defendant/ 1st Ancillary Defendant

MALCOLM CREESE

4th defendant/ 1st Ancillary defendant

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Mr. Duane Daniel for the 3rd and 4th Defendants/Applicants

Mr. Cecil A. Blazer Williams for the 1st and 2nd Defendants/Respondents

Ruling on Application to strike out Ancillary claim 2016: September 13,

RULING

- **ACTIE, M.:** The third and fourth defendants/ancillary defendants(the Applicants) by application filed on 25th November 2015 seek an order of the court to strike out the counterclaim and ancillary claim filed by the first and second defendants(the Respondents) on December 3, 2012 and 17th April 2015 respectively. For the reasons given below, the application is refused with costs to the Respondents.
- It is instructive to provide the chronology of events giving rise to the extant

Background facts

- The claimants were on 11th day of November 2009 sitting at the front of a building at the side of the Vigie Highway opposite the Belair Gap, Saint Vincent & the Grenadines awaiting the arrival of public transportation when the 2nd defendant, an agent of the 1st defendant, collided with a vehicle driven by the 4th defendant, an agent of the 3rd defendant. The impact resulted in the vehicle driven by the 4th defendant to run off the road, mounted a pavement and struck down the claimants resulting in serious injuries.

- The claimants on 28th February 2012 filed a claim form and statement of claim against all four defendants claiming damages for the injuries suffered as a result of the Since the filing of the claim there has been a plethora of events leading to this application as outlined below :
 1. 28th February 2012 - claim form and statement of claim filed
 2. 8th March 2012 - 3rd defendant filed acknowledgment of service
 3. 12th March 2012 - 4th defendant filed acknowledgment of service
 4. 28th March 2012 - 3rd and 4th named defendants filed defence denying the claim
 5. 5th April 2014 - Claimant filed request for entry of judgment against 1st and 2nd named defendants
 6. 18th April 2012 - Judgment in default entered against 1st & 2nd defendants
 7. 30th April 2012 - Notice of acting of counsel on behalf of 1st & 2nd defendants
 8. 5th July 2012 - 1st & 2nd defendants filed notice of application to set aside judgment in default
 9. 26th July 2012 - claimants filed notice of application to strike out application to set aside judgment in default against 1st & 2nd defendants
 10. 26th November 2013 - Judgment in default against 1st and 2nd defendant set aside by consent
- 16. 29th November 2013 - claimant filed an amended statement of claim
- 17. 3rd December 2013 - 1st and 2nd defendants filed defence and counter claim/ancillary claim against the 3rd & 4th defendant .
- 18. 23rd December 2013 - 3rd & 4th defendants filed amended defence
- 19. 13th April 2015 - 1st and 2nd defendant filed notice of application for counterclaim filed on 3rd December 2013 to be treated as an ancillary claim pursuant to CPR 3 and 26.8 of CPR 2000.
- 20. 13th April 2015 - Case management conference - Master Corbin granted leave to 1st and 2nd defendants leave to file and serve an ancillary claim within 7 days.
- 21. 17th April 2015 - 1st & 2nd defendant filed ancillary claim.
- 22. 20th May 2015 - 1st and 2nd defendant ancillary defendants file a defence to the first and second ancillary defendants ?
- 23. 28th May 2015 - 1st and 2nd defendants filed reply to ancillary defendants
- 24. 18th & 25th September 2015 - mediation held but unsuccessful
- 25. 1st October 2015 - trial directions given
- 26. 25th November 2015 - 3rd & 4th Defendants filed application to strike out counterclaim and ancillary claim

The application

- The 3rd and 4th defendants/1st and 2nd ancillary defendants (The Applicants) in their notice of application filed on 25th November 2015 apply for (1) the ancillary claim form filed on 17th April 2015 and counter claim filed on 3rd December 2012 by the 1st defendant/ancillary claimant be struck out; (2) the ancillary claim filed on 17th April 2015 and the counter claim /statement of claim filed on 3rd December 2012 by 2nd defendant/2nd Ancillary defendant be struck out.

- The application is made pursuant to CPR 26.3 (1), CPR 8.1 (1) and CPR 26.2 of the CPR 2000. The application is also made pursuant to Section 13(4) of **The Limitation Act, 1 of the Laws of Saint Vincent & The Grenadines.**

1 Cap 129 of the laws of Saint Vincent & the Grenadines

- The Applicants contend that section 13(4) of the **Limitation Act of Saint Vincent and the Grenadines** provides a limitation period of three (3) years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. The Applicants aver that the ancillary claims filed by the Respondents are statute barred having been filed in excess of five years after the cause of action accrued and should accordingly be struck out. Further or in the alternative, the Applicants contend that the ancillary claim filed does not disclose any cause of action against them.
- Counsel for the Respondents in response states that the application to strike out the ancillary claims should be dismissed. Counsel avers that the application is tantamount to an appeal against the order of Master Corbin-Lincoln made on 13th April 2015.

Law and Analysis- Striking Out Statement of Case

- **CPR 26.3** outlines the sanctions for the striking out of a statement of case. CPR 26.3(1) provides that in addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that -

(a)

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

(c).....

[10] **CPR 18** governs ancillary claims. **Rule 18.1** defines an " **ancillary claim**" as 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

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

Ancillary claim to be treated as claim for purposes of these Rules

18.2 (1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this rule.

- Particulars of an ancillary claim must be contained in or served with the ancillary claim form in Form 9.
- An ancillary claim form must include -
 - the ancillary claimant's address for service in accordance with rule 3.11; and (b) a certificate of truth in accordance with rule 12.
- **CPR 20.2** provides for the changes to the statement of case after the limitation period and gives the court a discretion to allow amendments taking into consideration the factors outlined in the Practice Direction No. 5 of 201
- **CPR 8.1** requires a claimant to properly set out its case and plead the factual matrix of the case in the statement of case.
- My first observation is that when the matter came up for the first case management conference, master Corbin -Lincoln accepted that the respondents "counterclaim" in their defence did not amount to a counterclaim as against the original claimants as defined by the rules. The master ruled that the pleadings appear to have been setting facts to establish a claim against the Applicants only. At that point counsel for the Respondents informed the master that an application had been filed for the counterclaim to be deemed as an ancillary claim. The master intimated that the application was not before her.
- Counsel for the Applicants at the case management conference expressed his objections on the ground that leave was required for the Respondents to file their ancillary claim at that late stage. Master Corbin-Lincoln in exercising her discretion having regard to CPR 18.4 (1) and acknowledging that a party required the court's permission to file an ancillary claim after the case management conference granted the Respondents leave to file an ancillary claim against the Applicants. The master in her order stated there was no evidence that the Applicants would suffer any prejudice if permission were granted to the Respondents to file an ancillary claim. Master Corbin further directed that the document labelled "counterclaim" in the defence be deemed to be the statement of claim filed in support of the ancillary claim form.
- The Applicants now seek to strike out the ancillary claim on the ground that the claim does not disclose any cause of action and is statute barred. The Applicants contend that Master Corbin-Lincoln granted the Respondents leave to file an ancillary claim and the document labelled counterclaim to be deemed to be the statement of claim.
- I am of the view that the issue of limitation bears no consequence at this stage of the The Applicants were already parties to the original claim. The ancillary claim emanated from the same facts which had already been pleaded in statement of claim and responded to in the defences filed. The Respondents in their defence attempted to make the Applicants ancillary defendants to the original claim filed by the claimants. The master at that time realizing the defect in the manner in which the Respondents purported ancillary claim was presented in the form of a counter claim directed that the purported counter claim be filed as an ancillary claim. This was done in an effort to remedy the defect and to put matters right as envisaged by CPR 26.9. Also, CPR 20 gives the court a discretion to allow amendments to a statement of case after the limitation period if the matter arises out of the same facts.
- The Applicants avers that the ancillary claim form filed is more in keeping with a statement of claim rather than a claim form. The Applicants objection is merely procedural rather than substantive. A claim should not be struck out merely on procedural irregularities or form. The ancillary claim against the Applicants clearly

refers to facts already pleaded in the defence and the purported counter claim which the Master accepted and directed to be filed as the ancillary claim. The particulars of the Applicants purported negligence are sufficiently outlined in the ancillary claim.

- A statement of case before the Court must disclose a reasonable cause of action which is simply stated as "a factual situation the existence to which entitles a party to obtain from a Court a remedy against another person. A reasonable cause of action is one with some chance of success when only the allegations on the pleadings are considered"² The Respondents in the purported counterclaim now ancillary claim states that the accident was caused by the Applicants negligence as particularized.
- The principle that the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer was established by Saville LJ in **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd**³ and was approved in **East Caribbean Flour Mills v Ormiston Ken Boyea et al**⁴. I am of the view that the particulars as pleaded are sufficient to allow the Applicants to respond to the claim at
- CPR 26.3(1) provides that the court may strike out a statement of case or part of a statement of case if it appears: (a) that there has been a failure to comply with a rule, practice direction, order or direction given by the court in proceedings or (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending the claim.

² Per Lord Pearson in *Drummond Jackson -v- British Medical Association* (1970) 1 All ER 1094 CA

³ (1994) 72 BLR 26, 33 -34

⁴ Civil Appeal No. 12 of 2001)

- The striking out of a claim has been described as draconian as it deprives a party of an opportunity to present its case at trial. The Court of Appeal in *Tawney Assets Limited v East Pine Management Limited*⁵ citing *Baldwin Spencer v The Attorney General of Antigua and Barbuda*⁶ states:

"The striking out of a party's statement of case, or most of it, is a drastic step which should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial"

- I agree with counsel that the objection now being raised by counsel for the Applicants is tantamount to an appeal of Master Corbin-Lincoln's decision granting the Respondents leave to file and serve an ancillary claim against the Applicants. The master considered CPR 4 (1) and acknowledged that a party requires permission from the court to file an ancillary claim after the case management conference. There is no evidence that the Applicants raised the issue of the limitation at the time of the Master's ruling and even so the order of the master stands unless set aside or successfully appealed.

- I consider the fact that the Applicants were already parties to the original claim filed by the claimants during the limitation period. I am of the view that the applicants having failed to file an appeal is now seeking to mount a collateral attack against Master Corbin-Lincoln's order. This is an abuse of process and should not be countenanced by the court. The court is of the view that the counter claim now ancillary claim provides sufficient particulars to enable the matter to proceed to The Applicants having filed their defence cannot now apply some

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6 ANUHCVP 1997/ 0020A

seven (7) months after the master's order seeking to strike out the ancillary claim. The Court is obliged to promote the saving of time and expense in dealing with cases justly and cannot now encourage the tardiness of the Applicants' application at this late stage. The Applicants having filed the defence have submitted to the court's jurisdiction to deal with the claim. The court is of the view that the Applicant's application is devoid of merit and should be dismissed.

- Accordingly the application by the 2nd and 3rd defendants to strike out the ancillary claim filed by the 1st and 2nd defendants is refused with costs to the 1st and 2nd defendants in the sum of \$500.00.
- The matter shall be set before the master for further case management conference if necessary.
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AGNES ACTIE

MASTER

By the Court